90-1075

In The

Supreme Court of the United States

October Term, 1990

JOE E. WALKER, JR., D/B/A
THE LAST CHANCE LOUNGE,

Petitioner,

vs.

CITY OF KANSAS CITY, MISSOURI; RICHARD L. BERKLEY, MAYOR OF KANSAS CITY, MISSOURI; THE CITY COUNCIL OF KANSAS CITY, MISSOURI; CHUCK WEBER; SALLY JOHNSON; FRANK PALERMO; ROBERT M. HERNANDEZ; JOANNE M. COLLINS; CHARLES A. HAZLEY; DAN COFRAN; KATHERYN SHIELDS; EMANUEL CLEAVER; MARK BRYANT; AND JOHN A. SHARP,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. MAY A COURT OF APPEALS IN A CASE ARISING UNDER THE FIRST AMENDMENT, REVERSE A DISTRICT COURT ON THE BASIS OF THE TWENTY-FIRST AMENDMENT, AN AMENDMENT NEVER RAISED BY THE PARTIES OR DISTRICT COURT IN ANY PROCEEDING BELOW?

II. MAY MUNICIPAL ZONING ORDINANCES THAT ARE NOT SPECIFICALLY PROMULGATED UNDER THE TWENTY-FIRST AMENDMENT BE CONSTRUED AS LIQUOR CONTROL REGULATIONS IN ORDER TO PROHIBIT FIRST AMENDMENT PROTECTED EXPRESSION IN ESTABLISHMENTS THAT SERVE LIQUOR?

III. IS SEMI-NUDE DANCING PERFORMED AS ENTERTAINMENT, EXPRESSION ENTITLED TO FIRST AMENDMENT PROTECTION AND, IF SO, IS § 39.156 OF THE CODE OF GENERAL ORDINANCES OF THE CITY OF KANSAS CITY, MISSOURI, UNCONSTITUTIONAL?

IV. IS SEMI-NUDE DANCING PERFORMED AS ENTERTAINMENT, OBSCENE UNDER THE STANDARDS OF *MILLER V. CALIFORNIA*, 413 U.S. 15 (1973)?

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 7, 1990.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals entered on August 7, 1990, is reported at 911 F.2d 80 (8th Cir. 1990), and is reproduced as Appendix A. The order of the Eighth Circuit Court of Appeals entered on November 30, 1990, denying the Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced as Appendix B. The order of the District Court for the Western District of Missouri of January 21, 1988, dismissing the individual Defendants is reproduced as Appendix C. The decision of the District Court of June 28, 1988, granting Petitioner's Request for Injunctive Relief is reproduced as Appendix D and reported at 691 F.Supp. 1243 (W.D. Mo. 1988). The District Court decision of October 20, 1990, imposing an injunction against the Defendant and denying Petitioner's claim for damages is reported at 697 F.Supp. 1088 (W.D. Mo. 1988) and reproduced as Appendix E. The order of the District Court of November 22, 1988 denying Petitioner's Motion for New Trial is reproduced as Appendix F.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was rendered on August 7, 1990. A timely filed Petition for Rehearing with Suggestions for Rehearing En Banc was denied on November 30, 1990. This Petition for Writ of Certiorari is filed within ninety (90) days of that date. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Fifth, Fourteenth and Twenty-first Amendments to the United States Constitution, United States Code (42 U.S.C. §1983), Missouri Statutes (§573.010(13) R.S. Mo. (Supp.)), and Kansas City, Missouri Code of General Ordinances (§39.156) are set forth as Appendix G.

STATEMENT OF THE CASE

Petitioner, Joe E. Walker, Jr., desired the rezoning of the property on which his bar, the Last Chance Lounge, is located from district C-2 (commercial use) to district C-2/C-X, in order that he could offer go-go girls as entertainment. Pursuant to the zoning ordinance in effect at the time (located at §39.156 of the Code of General Ordinances for the City of Kansas City, Missouri, and contained in Appendix G), C-X (adult use) "overlay" zoning was required to offer go-go dancing as entertainment.[1] The C-X zoning ordinance further provided that a C-X district could not be established within 1,000 feet of an area zoned for residential use, unless the person applying for the C-X zoning acquired the approval of 51% of the persons residing or owning property within a radius of 1,000 feet of the location of the proposed use.

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[1] Go-go dancing falls under the ordinance's definition of "exotic dancing." The ordinance defines an exotic dance facility as:

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Petitioner obtained the necessary approval of 51% of the residents and made application for rezoning of the property. On April 1, 1986, the City of Kansas City's City Plan Commission recommended approval of the zoning change, which permitted Petitioner's application to be forwarded to the City Council. Hearings were held on the rezoning application by the Plans and Zoning Committee of the City Council but over a year passed without a decision by the City Council. Petitioner consequently brought suit under 42 U.S.C. §1983 alleging that the City and City Council violated his constitutional rights of free speech and due process and that the Defendants had conspired to deprive him of his civil rights. Petitioner sought an injunction and damages. The City Council ultimately denied Petitioner's rezoning application after the filing of his lawsuit.

After a hearing on Petitioner's Motion for Preliminary Injunction which was converted into a trial on the merits of the case, the United States District Court for the

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> Any building, structure or facility which contains, or is used for commercial entertainment, where the patron directly or indirectly is charged a fee to observe "specified anatomical areas," provided that the genitals and pubic area of all persons and the areola and nipple of the breasts of all female persons are opaquely covered.

§39.156(I)(C), City of Kansas City, Missouri Code of General Ordinances. The C-X zoning ordinance also addresses zoning for other adult uses such as adult bookstores, theatres, bath houses, massage shops, modeling studios, and artist-body painting studios.

Western District of Missouri held that the zoning ordinance violated Petitioner's First Amendment rights as it constituted a prior restraint on protected speech. *Walker v. City of Kansas City*, 691 F.Supp. 1243 (W.D. Mo. 1988). The District Court determined that the type of dancing which Petitioner sought to offer at the Last Chance Lounge was protected expression under the First Amendment. *Id.* at 1249. The District Court reasoned that because nude dancing had been held to be protected expression by the United States Supreme Court, citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), as an example, then "go-go dancing would be entitled to protection since the dancers would be partially clothed." 691 F.Supp. at 1249. The District Court then held that the zoning ordinance was unconstitutional because it allowed for the exercise of total discretion by the zoning officials, the City Council, on Petitioner's application for rezoning after he had met all of the objective criteria of the ordinance. *Id.* at 1250-1251. The District Court analyzed Petitioner's First Amendment claim as a licensing issue and followed United States Supreme Court precedent of *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) and *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). The District Court determined that the requirement imposed on Petitioner to obtain C-X zoning prior to allowing go-go dancing was essentially a requirement of obtaining a license for the purpose of engaging in this form of expression, hence a prior restraint. 691 F.Supp. at 1250.[2] In essence, the zoning ordinance was

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[2] The District Court held that the distinction between rezoning and licenses or special use permits urged by the City

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indistinguishable from a special use permit requirement for adult uses. *Id.* Although the District Court found for Petitioner on his First Amendment claims, it held against him on his due process claims.

Subsequent to the initial District Court decision, hearings were held on the extent of damages and the District Court enjoined the City from enforcing the C-X zoning ordinance against Walker, and awarded him nominal but not compensatory damages, and attorney's fees. *Walker v. City of Kansas City,* 697 F.Supp. 1088 (W.D. Mo. 1988). On appeal before the Eighth Circuit Court of Appeals, Petitioner contested the District Court's dismissal of the individual City Council members, rejection of his due process claims, limitation of damages to nominal rather than compensatory, and denial of his Motion for New Trial on the compensatory damages issue. The City of Kansas City cross-appealed on whether the District Court applied the proper standard of review to the City Council's actions. The City did *not* challenge the First Amendment status of the Petitioner's proposed entertainment.

The Eighth Circuit Court of Appeals' panel decision written by Judge Bowman reversed the judgment for Petitioner and upheld the validity of the ordinance under the Twenty-first Amendment, an amendment never

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was one without a difference because although the approval required from the City before an applicant may offer go-go dancing "is not technically in the form of a license or special use permit, an individual is unable to proceed with his plan unless the approval is given." 691 F.Supp. at 1250.

raised before by any party at any stage of the administrative or judicial proceedings. *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990). The decision further upheld the District Court's rejection of Petitioner's due process claims. Judge Bowman wrote several pages of admitted dicta containing his opinion that go-go dancing was not protected expression under the First Amendment, an opinion which was not joined by any other panel members.

Petitioner moved for a rehearing by the panel with suggestions for rehearing en banc, which was denied on November 30, 1990. This Petition for Certiorari follows.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REVERSE THE DISTRICT COURT BASED UPON AN ISSUE NEVER RAISED BY THE PARTIES OR COURT BELOW, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AND DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The decision of the Eighth Circuit Court of Appeals to reverse the District Court based upon the Twenty-first Amendment was, as Judge Lay noted in his dissent, indeed "startling news" to the parties, in light of the fact that this amendment "was never raised before the City Council, or factually discussed by Council members, or asserted in the district court, or briefed or argued by the parties in this court." *Walker v. City of Kansas City*, 911 F.2d 80, 98 (8th Cir. 1990) (Lay, C.J., dissenting). This case

came before the Eighth Circuit implicating First Amendment issues under a zoning ordinance and never involved Twenty-first Amendment issues under a liquor ordinance. The City's initial denial of Petitioner's rezoning application did not arise in the context of any liquor licensing ordinance and the issues raised in the District Court concerned the licensing of adult uses under the First Amendment. The City never attempted to justify its actions denying rezoning based on Twenty-first Amendment grounds. As Judge Lay notes, "this case does not relate to the regulation of liquor, but is a zoning case relating to land use." *Id.* at 99.

The Eighth Circuit Court of Appeals, by deciding a case based upon issues not before the District Court, or ever contemplated by the parties for that matter, departs from the conduct of judicial proceedings as approved by this Court.[3] In *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court stated that federal appellate courts do not consider issues not passed upon below so that parties may have the opportunity to offer all evidence they believe relevant to the issues and so that parties are not surprised on appeal. The Supreme Court explained:

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[3] In an even more startling suggestion, Judge Dumbauld in his concurring statement stated "we cannot escape the force of an Amendment to the Constitution. It is a part of the Supreme Law and we must apply it." 918 F.2d at 97. Judge Lay in his dissent from the Eighth Circuit's decision denying rehearing states that such an approach "would require an appellate court to review the entire United States Constitution in every decision" and that "the Supreme Court of the United States has never subscribed to such a freewheeling doctrine of the law." Slip. op. denying rehearing at p.7.

> . . . that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they had no opportunity to introduce evidence." We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because Petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute.

Id. at 120, quoting *Hormel v. Helvering*, 312 U.S. 522, 556 (1941).

The Supreme Court reversed the Eighth Circuit decision in *Singleton* for the reason that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Id.* at 121. Petitioner herein has had no opportunity to plead, produce evidence, brief or argue Twenty-first Amendment issues. The course of Petitioner's appeal would have been handled differently had Petitioner been aware that the Twenty-first Amendment was an issue. Petitioner would have been prepared to present evidence at the District Court level supporting the contention that the application of the ordinance in question could not be justified by Twenty-first Amendment considerations. An injustice has been caused, not avoided, by effectively precluding Petitioner of his day in court on this issue.

Other circuit courts of appeal are uniform in declining to consider matters not first presented to district

courts. *See, e.g., United States v. Immordino*, 534 F.2d 1378 (10th Cir. 1976). Moreover, other circuit courts of appeal uniformly decline to *reverse* trial courts on a basis not urged below. *See Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *County Fairways, Inc. v. Mottaz*, 539 F.2d 637 (7th Cir. 1976); *Bannert v. American Can Co.*, 525 F.2d 104 (6th Cir. 1975), *cert. denied*, 426 U.S. 942 (1976); *Christiansen v. Farmers Insurance Exchange*, 540 F.2d 472 (10th Cir. 1976); *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976). The reasoning of these courts is clear: to avoid the prejudice that occurs from a party not having a fair opportunity to defend and offer evidence on the different theory. *Universal Tankships, Inc. v. United States*, 528 F.2d 73 (3rd Cir. 1975).[4]

The Eighth Circuit clearly departs from the practice followed by other circuit courts of appeal and the practice of the Supreme Court in failing to allow Petitioner an

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[4] In fact, prior to its decision in the herein case, the Eighth Circuit conformed with other circuit courts of appeal in declining to pass upon issues not raised below. *See, e.g., Rogers v. Masem*, 788 F.2d 1288 (9th Cir. 1985); *Greyhound Lines, Inc. v. Morrow*, 541 F.2d 713 (8th Cir. 1976). Judge Lay states in his dissent from the Eight Circuit's decision denying rehearing that the *Walker* case is:

> the first case in the history of the Eighth Circuit wherein we *reverse* a district court on grounds that were (1) not factually engaged in by parties before the City Council, (2) not passed upon by the City Council, (3) not asserted in the district court, and (4) not briefed or argued before this court.

Slip Op. denying rehearing at p. 6 (Emphasis in the original.)

opportunity to address Twenty-first Amendment concerns prior to reversing the District Court.

II.

IN CONSTRUING A LAND USE ORDINANCE AS A LIQUOR CONTROL ORDINANCE, THE EIGHTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE APPROACH TAKEN BY OTHER CIRCUIT COURTS OF APPEAL IN CASES INVOLVING THE SERVING OF LIQUOR IN ADULT ENTERTAINMENT ESTABLISHMENTS.

The Eighth Circuit Court of Appeals decision ignores the difference between ordinances regulating liquor as opposed to land use. The Eighth Circuit lumped together any attempt at regulation under the City Council's perceived penumbra of authority. The Eighth Circuit's reliance upon the supposed authority of *California v. LaRue*, 409 U.S. 109 (1972) and *New York Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), is misplaced because the ordinances at issue in these Supreme Court cases emanated directly from authority derived from the Twenty-first Amendment rather than from a municipality's police power. The ordinance herein did not derive from the City's authority under the Twenty-first Amendment to regulate liquor but from the City's zoning authority which in turn derives from the City's police power. In Missouri, the power to zone involves the exercise of the policy power of the state. *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963); *St. Louis County v. City of Manchester*, 360 S.W.2d 638 (Mo. 1962).

The distinction is not one without a difference. The Eleventh Circuit in *Lanier v. City of Newton*, 842 F.2d 253

(11th Cir. 1988), found that because an ordinance which prohibited nude or semi-nude dancing in establishments which serve alcoholic beverages emanated from authority derived from the Twenty-first Amendment rather than from the municipality's police power, that "extensive and detailed legislative findings based upon substantial evidence that the prohibited activity contributed to criminal activity in the county are not required." *Id.* at 255. In contrast, when an ordinance is promulgated pursuant to authority other than that inherent in the Twenty-first Amendment, it needs more than a summary purpose statement to survive First Amendment challenge. In *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985), the Eleventh Circuit held that an ordinance that applies to nude or semi-nude entertainment in *any* commercial establishment does not regulate protected expression as an incident to the regulation of alcohol and is thus subject to challenge under the First Amendment. Similarly, in *Southern Entertainment v. City of Boynton Beach*, 736 F.Supp. 1094 (S.D. Fla. 1990), the district court found that the ordinance did not regulate nudity in conjunction with the regulation of alcohol and thus was subject to attack under the First Amendment.

The C-X zoning ordinance at issue nowhere mentions alcohol in its purpose statement, reproduced as Appendix H, and contains no findings at all regarding alcohol. A review of the summary of the Plans and Zoning committee meetings dealing with rezoning for the Last Chance Lounge contained in the District Court record reveals no mention of fears about the use of alcohol coupled with go-go dancing. The City Council minutes discussing this

ordinance similarly contain no mention of any feared impact of alcohol in conjunction with go-go dancing.

Petitioner's attack of the ordinance would not be affected by Twenty-first Amendment considerations because first, the ordinance as written applies to *all* commercial establishments regardless of the serving of liquor. Second, the ordinance not only requires C-X zoning for establishments that have what may be described as "semi-nude" dancing but by its prophylactic definition of "exotic dance facility", would include dancers clothed in cheerleading or exercise garb. The ordinance does not allow nude dancing. Consequently, the ordinance is not properly framed to address the perceived evils of combining alcohol with total or partial nudity and cannot be saved by reliance upon the Twenty-first Amendment.[5]

Beyond failing to consider the fact that the Kansas City C-X zoning ordinance applied to *any* establishment that dealt in certain types of adult entertainment, *regardless* of the serving of liquor, the Eighth Circuit also ignored the fact that the City has an entire code of ordinances relating exclusively to liquor control which nowhere prohibits the service of alcohol in go-go dancing establishments, contained in Chapter 4 of the Code of General Ordinances. The decision of the Eighth Circuit on

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[5] In *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985), the Eleventh Circuit found deficient that city's attempt to regulate topless dancing in alcoholic drinking establishments because the city failed to show any legitimate purpose for it. Even if the Kansas City ordinance could be held to emanate from Twenty-first Amendment power, the City has failed to meet the test of showing any legitimate purpose to justify banning this type of entertainment.

this issue completely precluded Petitioner from an opportunity to show that he complied with the City's liquor control regulations, thus surviving Twenty-first Amendment scrutiny.[6]

The Eighth Circuit's treatment of this zoning ordinance as emanating under the Twenty-first Amendment conflicts with the requirements imposed by other circuit courts of appeal on municipalities attempting to regulate nude or semi-nude dancing in establishments that serve liquor; namely that the regulation arise in the context of liquor regulation and be justifiable within the purpose of the regulation.

III.

THE PRONOUNCEMENTS OF THE EIGHTH CIRCUIT COURT OF APPEALS REGARDING THE PROTECTION OFFERED TO SEMI-NUDE DANCING UNDER THE FIRST AMENDMENT CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

While part two of the opinion of the Eighth Circuit Court of Appeals dealing with the protection afforded to nude or semi-nude dancing under the First Amendment

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[6] Judge Posner in his concurring opinion in *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1101 (7th Cir. 1990), remarks:

> *Why* the Twenty-first Amendment, the aim of which was to repeal Prohibition without eliminating state authority over the sale of liquor, should be thought to curtail the scope of the First Amendment is an abiding mystery of constitutional interpretation.

(Emphasis in the original.)

was explicitly repudiated by the other two members of the panel, these pronouncements conflict with decisions of the Supreme Court and other circuit courts of appeal.

The Eighth Circuit first discounts the precedential value of the statement of the U.S. Supreme Court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) to the effect that nude dancing is not without First Amendment protection. The Supreme Court in *Schad* dealt with an ordinance which prevented all live entertainment within the borough. In the course of its opinion, the Supreme Court noted that " . . . nude dancing is not without its First Amendment protections." *Id.* at 66.

Petitioner has relied upon this statement as a pronouncement of the Supreme Court's view of nude dancing in support of his claim that dancers who are clothed should be entitled to First Amendment protection. It is not surprising that he relies on *Schad* since the City of Kansas City in its appellate brief and a number of Supreme Court justices have done the same. *See, e.g., FW/PBS, Inc. v. City of Dallas*, ___ U.S. ___, 110 S.Ct. 596, 604 (1990); *Massachusetts v. Oakes*, ___ U.S. ___, 109 S.Ct. 2633, 2642 (1989) (Brennan, Marshall and Stevens, J.J., dissenting).

There is no holding which actually or impliedly repudiates the *Schad* statement. Justice White has explicitly noted that such protection is the clear implication of *Schad* and other cases.*Young v. Arkansas*, 474 U.S. 1070 (White, J., dissenting). Justice White did not question that non-obscene nude dancing is protected by the First Amendment. Indeed, in a most recent opinion on the matter, there was a lengthy discussion of the meaning of

Schad and the "implied" holding cited by Justice White in his *Young* dissent. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1084 (7th Cir.), *cert. granted sub nom., Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 38 (1990).

The Eighth Circuit will stand alone in declaring non-obscene semi-nude dancing as unprotected by the First Amendment. *Miller v. Civil City of South Bend; International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986); *Doe v. City of Minneapolis*, 693 F.Supp. 774 (D. Minn. 1988), *aff'd*, 898 F.2d 612 (8th Cir. 1990); *Salem Inn, Inc. v. Frank*, 501 F.2d 18 (2d Cir. 1974), *aff'd*, 442 U.S. 922 (1975); *Attwood v. Purcell*, 402 F.Supp. 231 (D. Ariz. 1975); *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska 1982).

The Eighth Circuit holding on the First Amendment status of Petitioner's desired entertainment also resulted in its rejection of Petitioner's due process claims on the basis that Petitioner had no right to display go-go girls in a bar. This summary dismissal of Petitioner's due process claims seems purely based on a disdain for go-go dancing and prejudiced Petitioner's claim for damages due to the City Council's delay in deciding his rezoning application.

The Eighth Circuit's decision clearly is a departure from Supreme Court precedent and conflicts with decision of other circuits. The issue of First Amendment protection for this type of dancing is of constitutional importance and deserving of a clear pronouncement from the Supreme Court.

IV.

THE SUGGESTION OF THE EIGHTH CIRCUIT COURT OF APPEALS THAT SEMI-NUDE DANCING IS OBSCENE CONFLICTS WITH THIS COURT'S DECISION IN *MILLER V. CALIFORNIA*, 413 U.S. 15 (1973), AND THE DECISIONS OF CIRCUIT COURTS OF APPEAL.

Whatever the scope of First Amendment protection accorded to dancing at the Last Chance Lounge, no one ever suggested (until the Eighth Circuit decision) that it lacked protection because such dancing ran afoul of the obscenity laws. Nowhere in the record of this case is there a finding of fact that the dancing offered at the Last Chance Lounge is obscene, nor has any allegation of obscenity been made.

The applicable test for obscenity is set out in *Miller v. California*, 413 U.S. 15, 24 (1973). Any discussion of obscenity in this case might logically begin with a determination of whether the work under review "depicts or describes in a patently offensive way sexual conduct specifically defined by state law." The Eighth Circuit decision completely bypasses this test. Under Missouri law ("the applicable state law"), sexual conduct is defined in §573.010(13) R.S.Mo. (Supp.).

The Last Chance Lounge features dancing by women "attired in bikini bottoms and pasties." *Walker*, 911 F.2d at 84. Under no conceivable circumstances can this dancing fall under the Missouri definition of sexual conduct. The Eighth Circuit opinion nonetheless asserts that entertainment such as that offered at the Last Chance Lounge is commonly deemed offensive and degrading. *Id.* at 87.

Even presuming that "offensive and degrading" is synonymous with "patently offensive," the simple fact is that this is not enough to run afoul of the obscenity laws. Without a representation of sexual conduct as defined by the statute, offensiveness of the performance is simply irrelevant.

A similar misstatement of fact and law appears in the opinion in its discussion of the "prurient interest" prong of the *Miller* test. The court states that the concurring opinions in *Miller v. Civil City of South Bend*, which characterize nude dancing as erotic and sensual, means that the judges "openly acknowledge the prurient appeal of nude dancing." *Id.* at 88. By this leap in logic, the Eighth Circuit has taken the impermissible legal leap of defining "sensual" or "erotic" to mean "prurient."

The legal meaning of prurient has long been established and whatever the varying shades of meaning different courts or persons may ascribe to the term, this much is long settled – sex and prurience are not the same. *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957). The dancers at the Last chance Lounge may "express erotic emotions" but it is clear beyond question that this fact alone does not equal an appeal to prurient interest within the meaning of *Miller v. California*.

More to the point, the statement in the Eighth Circuit opinion that "if the message communicated by such barroom dancers is primarily one of prurience, that communication is not entitled to First Amendment protection" (911 F.2d at 88) is a misstatement of the law. All three prongs of *Miller v. California* must be met to have unprotected obscenity. Appeals to the prurient interest

are fully protected if those appeals are not made with patently offensive depictions of sexual conduct or if they have literary, artistic, political or scientific value. In this case, there is no question that there are no depictions of sexual conduct as defined by the applicable state law, so an appeal to prurience, if any, would still have First Amendment protection.

Finally, the Eighth Circuit decision merely states that those urging First Amendment protection for such conduct "make no pretension that near-naked girls jiggling for the titillation of the boozing clientele at a bar have any 'serious literary, artistic, political or scientific value'." 911 F.2d at 87. The obvious response is that Petitioner was never given a chance to make an argument in this regard. There was never any suggestion in the record from the District Court that the dancing presented at the Last Chance Lounge was anything but non-obscene protected expression. Further, one need only look at the opinion in *Miller v. Civil City of South Bend* to see numerous "pretensions" supporting that such dancing has artistic value. 904 F.2d at 1089 (Posner, J., concurring). In fact, the Eighth Circuit's reliance on *Miller v. Civil City of South Bend*, is misplaced considering the Seventh Circuit's statement that "[t]his case does not concern obscenity, as the State has conceded that the dancing involved is not obscene." 904 F.2d at 1082. The Indiana public indecency statute involved in *Miller* allowed nude dancing. If nude barroom dancing did not raise the specter of obscenity in South Bend, Indiana, surely clothed dancers in Kansas City, Missouri, should not.

Obscenity has not and never will be an issue in this cause and to inject it into the opinion of the Eighth

Circuit is not only unfair to the parties, who did not have an opportunity to address the issue, but because it misstates applicable Supreme Court precedents, it stands as a guidepost to entice others into error.

V.

A WRIT OF CERTIORARI HAS BEEN GRANTED IN A SIMILAR CASE.

The Supreme Court has granted certiorari in *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir.), *cert. granted sub nom., Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 38 (1990) and oral argument has been scheduled in January of 1991. In *Miller*, the Seventh Circuit *en banc* held that non-obscene nude dancing of barroom variety performed as entertainment was entitled to protection under the First Amendment. 904 F.2d at 1085. The plaintiffs in *Miller* included a drinking establishment that serves alcoholic beverages and a theater that does not. The *Miller* decision was rendered based upon an analysis of Indiana's public indecency statutes, which is not the basis for this Petitioner's challenge, and a fact situation involving nude dancing, also not at issue here. However, the decision in *Miller* may be determinative of Petitioner's claim. To deny certiorari herein and allow the Eighth Circuit decision to stand would further compound the injustice suffered by Petitioner due to the Eighth Circuit deciding this case on issues not before it.

CONCLUSION

For all the reasons noted above, this Court should accept this case for review in order to promote uniformity among the various circuit courts of appeal with respect to decisions based on issues not before them. Furthermore, this case presents the court with an opportunity to confirm its pronouncements in *Schad v. Borough of Mt. Ephraim* and other cases regarding the scope of protected expression under the First Amendment.

Respectfully submitted,

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APPENDIX A

[Reported at 911 F.2d 80 (8th Cir. 1990)]

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1001

Joe E. Walker, Jr., d/b/a Last Chance Lounge, Appellant, v. City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp, Appellees.	*	Appeal from the United States District Court for the Western District of Missouri.

No. 89-1057

Joe E. Walker, Jr., d/b/a Last Chance Lounge, Appellee, v. City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp, Appellants.	* * * * * * * * * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 16, 1989

Filed: August 7, 1990

Before LAY, Chief Judge, BOWMAN, Circuit Judge, and DUMBAULD,* Senior District Judge.

BOWMAN, Circuit Judge.

* The HONORABLE EDWARD DUMBAULD, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

In June 1985, appellant Joe E. Walker, Jr., submitted a rezoning application to the Kansas City Plan Commission requesting that his property be granted a District C-X zoning classification, which would permit him to display go-go girls in his drinking establishment, the Last Chance Lounge. The Commission recommended approval of the zoning change, which permitted Walker's application to be forwarded to the City Council for consideration. Kansas City, Mo., Zoning Ordinance § 39.360(I) (1987). The Plans and Zoning Committee of the City Council held a series of hearings on the application, but over a year passed without a decision. Shortly before the City Council denied his application, Walker brought suit under 42 U.S.C. § 1983 against Kansas City and its Mayor and Council members alleging that they had violated his constitutional rights to free speech and due process and that the defendants had conspired to deprive him of his civil rights. He sought both an injunction and damages. After a hearing on Walker's motion for a preliminary injunction, which was converted into a trial on the merits of the case, the District Court found no due process violation, but held that the zoning ordinance violated Walker's First Amendment rights. *Walker v. City of Kansas City, Mo.* (*Walker I*), 691 F. Supp. 1243 (W.D. Mo. 1988). Following hearings on the scope of relief, the court enjoined the city from enforcing the ordinance against Walker and, rejecting Walker's argument for compensatory damages, awarded nominal damages. *Walker v. City of Kansas City, Mo.* (*Walker II*), 697 F. Supp. 1088 (W.D. Mo. 1988). The court also awarded attorney fees to Walker. On appeal, Walker contests the trial court's dismissal of the individual City Council members, rejection of his due process

claim, limitation of damages to nominal rather than compensatory, and denial of his motion for a new trial on the compensatory damages issue. The city cross-appeals the court's First Amendment holding and the award of nominal damages and attorney fees. We reverse the judgment for Walker on his First Amendment claim and vacate the injunction and the award of nominal damages and attorney fees. In all other respects, we affirm.[1]

I.

Section 39.156(II) of the Kansas City Zoning Ordinance requires that a District C-X classification be approved by the City Council antecedent to the establishment of a variety of sex-related businesses,[2] including that which Walker intended to institute in the Last Chance Lounge – "exotic dancing." An "exotic dance facility" is defined in the ordinance as

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[1] In the proceedings in the District Court Walker occasionally alluded to his claim of a conspiracy among the council members to deny his constitutional rights. He did not develop this claim, however, and the court did not address it. Walker raises no issue on appeal with respect to this claim. We take it to have been abandoned. In any event, it appears to be devoid of substance.

[2] Section 39.156 concerns "[a]dult book stores, adult entertainment facilities, adult theaters, bath houses, massage shops, modeling studios and artists-body painting studios, and exotic dance facilities." Kansas City, Mo., Zoning Ordinance § 39.156(II) (1987). At least some of these enterprises involve activities unrelated to speech and therefore are wholly without First Amendment protection. *See FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604 (1990).

> Any building, structure or facility which contains, or is used for commercial entertainment, where the patron directly or indirectly is charged a fee to observe "specified anatomical areas," provided that the genitals and pubic area of all persons and the areola and nipple of the breasts of all female persons are opaquely covered.

"Specified anatomical areas" entail:

1. Less than completely or opaquely covered:
   (a) Human genitals, pubic region,
   (b) Buttocks,
   (c) Female breast area below a point immediately above the top of the areola.
2. Human male genitals in a discernibly turgid state even if completely and opaquely covered.

Kansas City, Mo., Zoning Ordinance § 39.156(I)(I)&(P).

The particular brand of exotic dancing we deal with here – it was stressed by John Frankum, the attorney representing Walker during the Council hearings[3] – is go-go dancing. Frankum objected to the derogatory connotation implicit in the term "exotic dancers," claiming that the expression was misleading. The sort of person who is interested in go-go dancers, he explained, would not necessarily be "something less than someone who would want to watch the Kansas City Symphony." Amending ch.

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[3] These hearings were before a subgroup of the City Council, the Plans and Zoning Committee, which ordinarily makes a recommendation to the full Council before that body decides to approve or deny an application for rezoning.

65, Rev. Ordinances of Kansas City, Mo., 1956: Summary of Hearings on § 65.010A1952, Plans and Zoning Committee [hereinafter Zoning Committee Hearings] (May 7, 1987) (paraphrased statements of John Frankum). However characterized, Walker planned for his go-go girls to dance, for the pleasure of the customers of his bar, attired in bikini bottoms and "pasties," *i.e.*, adhesive material covering only the areolas of the girls' breasts. The girls would be permitted by Walker, however, to cover more of their breasts, as they preferred. *Id.* (statements of John Frankum). In any event, the sort of entertainment Walker hoped to provide at his establishment is undoubtedly covered by section 39.156 of the Kansas City zoning ordinance, and Walker does not argue to the contrary.

Because the Last Chance Lounge is located within one thousand feet of a residential district, Walker was not eligible for a District C-X classification for that property unless he could obtain the signatures of a simple majority of the residents and property owners within a radius of one thousand feet. There is no time limit to acquiring the signatures and so, ten months after filing his application, Walker presented the City Plan Commission with a waiver petition containing the names of nineteen of the thirty-seven residents located near his lounge.[4] That same day, in April 1986, the Commission approved the waiver

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[4] Shortly thereafter one of the nineteen attempted to retract his consent, which would, of course, have defeated Walker's eligibility to apply for District C-X zoning. The City Plan Commission, however, would not permit a retraction.

and recommended approval of the application, which was forwarded to the City Council.[5]

The Plans and Zoning Committee of the City Council discussed Walker's application at length during a series of meetings held at intervals throughout the ensuing period of approximately twenty months. Presentations by citizens opposed to the rezoning classification consumed the bulk of the hearings; indeed, except for the remarks of Council members and Walker's attorneys, discussion at the meetings consisted entirely of the protestations of private citizens in opposition to the rezoning. In all, roughly forty to fifty people spoke against the zoning change.[6] Zoning Committee Hearings (May 28, 1987). Eventually the matter reached the full Council (without a recommendation from the committee), and on December 17, 1987, the Council voted to reject the application.

In October 1987, approximately two months before the Council's vote, Walker brought this lawsuit alleging that the zoning ordinance violated his free speech and due process rights under the First, Fifth, and Fourteenth

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[5] Although neither party comments upon this, the Commission's virtually instantaneous approval of Walker's application was apparently in violation of the Zoning Ordinance, which requires – prior to the issuance of a recommendation – "due public notice and hearings, at which parties in interest and citizens shall have an opportunity to be heard." Kansas City, Mo., Zoning Ordinance § 39.360(I) (1987).

[6] In addition, at one of the hearings "about 30" members of the audience stood when a speaker asked all those opposed to the rezoning to stand. At least two lists containing signatures of others in opposition were submitted to the Committee. Zoning Committee Hearings (May 14, 1987).

Amendments of the United States Constitution. In December he moved for a temporary restraining order and a preliminary injunction. Failing to pursue this motion, Walker filed a renewed motion for a preliminary injunction some weeks later. In the interim the city and the Council members – whom Walker had sued in their individual capacities – filed a motion to dismiss, which the District Court granted as to the individual Council members. Subsequent to the hearing on the preliminary injunction, the parties agreed to treat that hearing as a trial on the merits and thus submitted post-trial briefs. In addition to the testimony adduced at the hearing, the court received reams of city documents and videotapes of various City Council meetings. In June 1988, the District Court issued its memorandum opinion and order in which the court rejected Walker's due process claims but found a violation of his First Amendment rights. *Walker I*, 691 F. Supp. 1243 (W.D. Mo. 1988). After additional hearings, the court entered an injunction prohibiting the city from enforcing the ordinance against Walker and awarded Walker nominal damages, but denied compensatory damages, finding that the evidence was insufficient to establish the amount of such damages with reasonable certainty. *Walker II*, 697 F. Supp. 1088 (W.D. Mo. 1988). The parties subsequently stipulated to the award of attorney fees and the court entered an order approving the stipulation on November 22, 1988.

We affirm the District Court's denial of Walker's due process claims but reverse its judgment for Walker on his First Amendment claim. Accordingly, we vacate the injunction and the award of nominal damages and attorney fees. Our decision moots Walker's claim against the

City Council members in their individual capacities and his claim for compensatory damages.

II.

Walker asserts that the entertainment he proposed to introduce at the Last Chance Lounge – pasty-clad dancing girls – constitutes "speech" within the meaning of the First Amendment. "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 n.5 (1984). Although the burden is thus his, Walker cites only the dictum from one Supreme Court case suggesting that nude dancing is protected speech while ignoring no small amount of dicta – as well as actual holdings – from other cases indicating the contrary.

The statement upon which Walker rests the entire force of his claim that semi-nude dancing girls constitute protected speech is taken from *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), a case involving a statute that prohibited *all* live entertainment within Mount Ephraim: "no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment." 452 U.S. at 66. The live entertainment appellants in that case proposed to introduce to the city of Mount Ephraim was, in fact, nude dancing. But the Court invalidated the ordinance on overbreadth grounds alone: "Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough

. . . . " *Id.* Consequently, the Court's statement that "nude dancing is not without its First Amendment protections," 452 U.S. at 66, is unadulterated dicta – and dicta quite wide of the holding. Indeed the author of that very statement, Justice White, has subsequently explicitly stated that the Court has never decided whether nude dancing is entitled to any First Amendment protection. *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J., dissenting from denial of certiorari); *see also New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718-19 (1981) (Stevens, J., dissenting).

Were there no other statements from Supreme Court opinions relevant to the First Amendment status of nude or semi-nude dancing, this dictum would merit some deference. There have, however, been many such emanations from the Court relevant to this question, and examples of these that seem to confute Walker's bald assertion are not wanting. Thus, for example, the Court has stated: "[N]udity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live . . . nudity can be exhibited or sold without limit in such public places." *Miller v. California*, 413 U.S. 15, 25-26 (1973). Appended as a footnote to that statement is this one: "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." 413 U.S. at 26 n.8. In *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the Court stated:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do

> not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

413 U.S. at 67. And again in *California v. Larue*, 409 U.S. 109 (1972), the majority opinion noted: "[A]s the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." 409 U.S. at 117.

Even Justice Douglas – famous for his dissents in many First Amendment cases (including each of the cases quoted above) in which he asserted that any number of pornographic items constituted protected speech[7]

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[7] Interestingly, though, Justice Douglas dissented in *Larue* only because the California regulations challenged in that case – which prohibited live sexual entertainment in bars – had not yet been enforced against anyone. He explicitly accepted the majority's discussion of the First Amendment status of nude dancing, 409 U.S. at 116-18, even though the Court's holding was not based exclusively on its finding that the performances at issue more closely resembled conduct than expression. Thus, Justice Douglas wrote:

> The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or narrowly these rules will be applied.

409 U.S. at 121 (Douglas, J., dissenting).

– apparently would have drawn the line at "exotic" dancing. Thus, he wrote: "I assume there is nothing in the Constitution which forbids Congress from . . . proscrib[ing] *conduct* on the grounds of good morals. *No one would suggest that the First Amendment permits nudity in public places. . . . " Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) (emphasis added to second sentence). In a later case – and later dissent – Justice Douglas noted the historical roots of the distinction he drew between sexually explicit – indeed obscene – literature and actual people shedding their clothes in public places:

> The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contra pacem, and to the scandal of the Government." *Sir Charles Sydlyes Case*, 83 Eng. Rep. 1146-1147 (K. B. 1663). Rather than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. *E. g., Bradlaugh v. Queen*, L.R. 3 Q.B. 569, 634 (1878); *Rex v. Curl*, 93 Eng. Rep. 849, 851 (K. B. 1727) (Fortescue, J., dissenting).

United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 134 (1973) (Douglas, J., dissenting). If there is a distinction between Sir Charles's disrobing and the go-go girls' performance at the Last Chance Lounge, it at least cannot be said that that distinction lies in the lack of expressiveness of Sir Charles's conduct.

That some lower courts have found nude dancing to be protected speech, thus entering territory that even the First Amendment "absolutist" Justice Douglas considered beyond the pale, calls to mind the cautionary dictate periodically invoked by the Court regarding the tendency of "[a]ll rights . . . to declare themselves absolute to their logical extreme." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

12 200-Ft. Reels, 413 U.S. at 127 (citations omitted). The indicators that an "end result . . . that would never have been seriously considered in the first instance" may be reached when the performances of "go-go girls" are accorded First Amendment protection include not only the rather clear statements to the contrary in various Supreme Court opinions, but also the clash such a result produces with other constitutional principles. Like all other rights, the right to express oneself freely is "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.*, 209 U.S. at 355 (Holmes, J.). When "expression" takes the

form of go-go dancing, it may be that those other principles are ascendant.

One of the neighboring principles with which "go-go" dancing as protected speech must inevitably collide is that which holds obscene speech unprotected by the First Amendment. Obscenity is defined as material that " 'the average person, applying contemporary community standards' would find . . . taken as a whole, appeals to the prurient interest; . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. at 24 (citations omitted). Scantily clad barroom dancing girls are unlikely to find safe haven in the final two criteria of the obscenity test: an informal catalogue of only those attempts by cities to regulate or prohibit such conduct that reach the courts establishes beyond cavil that entertainment such as that in the Last Chance Lounge is commonly deemed offensive and degrading,[8] and "[p]ublic nudity is . . . prohibited in every state." *Miller v. Civil City of South Bend*, No. 88-3006/3244, slip op. at 101 (7th Cir. May 24, 1990) (en banc) (Manion, J., dissenting). Moreover, even those who would hold such conduct protected speech make no pretension that near-naked girls jiggling for the

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[8] *See Paris Adult Theater*, 413 U.S. at 63 ("The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.").

titillation of the boozing clientele at a bar have any "serious literary, artistic, political, or scientific value."[9] If such behavior is to escape the obscenity guillotine, therefore, it must not define its expressive quality as an appeal to the prurient interest. This presents something of a conundrum for those who would describe such behavior as protected speech. To the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment "speech," it may contain a message that nonetheless is categorically unprotected by the First Amendment – that is, an appeal to the prurient interest.

In one of the most expert linguistic navigations imaginable between the Scylla of "nonexpression" and Charybdis of "expression appealing to the prurient interest," one court has described the communicative value of such dancing thus: "The dominant theme communicated here by the [nude female] dancers is an emotional one; it is one of eroticism and sensuality [– t]hough this dance is clearly of inferior artistic and aesthetic quality as contrasted with a classic ballet. . . . " *Miller v. Civil City of South Bend*, slip op. at 11-12 (footnote omitted) (holding that nude dancing is protected speech). The concurrences in that case openly acknowledge the prurient appeal of nude dancing in their accounts of the "expression" implicit in such dancing. One judge writes:

> It seems to me beyond doubt that a barroom striptease is "expressive." Even if relatively

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[9] *See generally* the majority opinion and two concurrences in the highly divided Seventh Circuit en banc case, *Miller v. Civil City of South Bend*, No. 88-3006/3244 (7th Cir., May 24, 1990).

> restrained, as are the videos in evidence here, a striptease sends an unadorned message to a male audience. It is a message of temptation and allurement coupled with coy hints at satisfaction. In a real barroom, messages would probably also flow in the opposite direction, in the form of encouraging comments to the performer from the patrons. *E.g.* "Take it off; take it off!"

Miller, slip op. at 16-17 & n.1 (Cudahy, J., concurring). The other concurrence in that case goes beyond flirtation with the obscenity standard by describing the message sent by barroom dancing girls as being explicitly grounded in prurience:

> Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not invariably associated with sex. The goal of the striptease – a goal to which the dancing is indispensable – is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the preparations are complete. The sequel is left to the viewer's imagination. This is the "tease" in "striptease."
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> * * *
>
> Of course, there would be no female stripteases without a prurient interest in the female body . . . .

Miller, slip op. at 21 (Posner, J., concurring). If the message communicated by such barroom dancers is primarily

one of prurience, that communication is not entitled to First Amendment protection.

A peril even more difficult of circumnavigation than the potentially unprotected status of the message being communicated by Walker's "go-go" girls is the Supreme Court's recent holding that ballroom dancing does not constitute protected expression. In *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), the owner of a ballroom dance hall charged that a local ordinance limiting the use of dance halls to teenagers between the ages of fourteen and eighteen violated his patrons' "right of association." The Court described the two separate routes to protected freedom of association as entailing either an association involving "certain intimate human relationships" or an association formed "for the purpose of engaging in those activities protected by the First Amendment." 109 S. Ct. at 1594 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). After rejecting the first of these as a plausible characterization of ballroom dancing,[10] the Court went on to consider whether the ballroom dancers "were engaged in a form of expressive activity . . . protected by the First Amendment." 109 S. Ct. at 1595. Expressive activity of the sort that activates First Amendment protections, the Court held, ballroom dancing is not. Importantly, however, the Court did find that ballroom dancing was "associational," holding only that that association was simply not expressive. 109 S. Ct. at 1595.

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[10] *Stanglin*, 109 S. Ct. at 1595 ("It is clear beyond cavil that dance-hall patrons . . . are not engaged in the sort of 'intimate human relationships' [protected by the freedom of association].")

The right of expressive association has been considered a necessary adjunct to the rights secured by the First Amendment:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted). Because the right of expressive association is derived from those rights mentioned in the First Amendment, all that need be shown to establish the existence of such a right is, first, that a group of people have come together, and, second, that they have come together for the purpose of engaging in some activity protected by the First Amendment:

> What the Court *has* recognized as implicit in the first amendment, and therefore in the liberty secured by the fourteenth, is *a right to join with others to pursue goals independently protected by the first amendment*. . . .
>
> [Our Constitution] has at least protected the concerted pursuit of ends that would represent fundamental rights *in the context of purely individual activity*.

L. Tribe, American Constitutional Law 702-03 (1978) (emphasis added to second sentence). Assuming an association is found, therefore, any activity that would merit

First Amendment protection if engaged in outside the context of the association will suffice to constitute a right of association.[11]

In *Stanglin* the Court did find that the activities at the dance-hall were associational "in common parlance" but found that they were not expressive – "they simply do not involve the sort of expressive association that the First Amendment has been held to protect." 109 S. Ct. at 1595. Thus, although the respondent in *Stanglin* fashioned his argument as a right of association claim, the Court's statement that "this activity [does not] qualif[y] . . . as a form of 'expressive association,' " 109 S. Ct. at 1595, combined with the Court's finding that ballroom dancing in respondent's dance-hall was associational, establishes that ballroom dancing by itself is not protected speech.

While the precise sort of dancing at issue in *Stanglin* was ballroom rather than "go-go" dancing, it turns the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976) ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic

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[11] Of course, the right of association is no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association. *Compare United States v. O'Brien*, 391 U.S. 367, 377 (1968), *with Roberts*, 468 U.S. at 623.

expression. . . . "). Indeed, as Judge Easterbrook has noted:

> A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little virtue other than avoiding inconvenient precedent such as *Stanglin*. If the "expression" in barroom dancing lies, as my colleagues believe, slip op. at 11-12, in a celebration of sex, conveying the pleasure dancers take in sensuality, social dancing is the more expressive. Barroom dancers feign emotion; ballroom dancers express the real thing. So if precedent is what drives our court today, the most powerful case is *Stanglin*, which undermines the majority's conclusion [that barroom dancing is protected speech].

Miller v. Civil City of South Bend, slip op. at 96 (Easterbrook, J., dissenting).

Whether *Stanglin* preempts our consideration of the First Amendment status of "go-go" girls, and whether the gyrations of "go-go" girls at the Last Chance Lounge can be described as an appeal to either the intellect or those emotions not grounded in prurience, *see generally Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (noting the capacity of music to "appeal to the intellect and to the emotions," in holding that music "as a form of expression and communication" is protected speech), we do not decide today. Walker has suggested no theory under which we could find his go-go girls expressive of something protected by the First Amendment. Rather he states simply that "it has been held by the United States Supreme Court that nude dancing is entitled to some First Amendment protection." Appellant's Brief at 29. As we have noted above – and members of the Supreme

Court have noted in *Young v. Arkansas*, 474 U.S. at 1072, and *Bellanca*, 452 U.S. at 718-19 – the Supreme Court has held no such thing. We raise the specter of an obscenity determination and of the *Stanglin* precedent only to point out some of the land mines that await proponents of the view that go-go girls communicate constitutionally protected expression.[12]

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[12] The dissent correctly points out that our comments on the doubtful standing of go-go dancing as First Amendment speech are dicta. In addition, the dissent asserts that they are "clearly wrong." We note only that the dissent's argument rests *exclusively* on dicta from *Schad*. It would seem that the three reasons offered by the dissent for finding our discussion of the First Amendment status of nude dancing "clearly wrong" are merely three restatements of a general argument that the dicta in *Schad* should be controlling. Indeed, the lower court cases cited in the dissent for the proposition that nude dancing is protected speech all rely on the dicta in *Schad*. We also note that, contrary to the view expressed in the dissent, the First Amendment status of Walker's go-go girls is properly before us in this case. The Kansas City ordinance was struck down by the District Court on only one ground: Walker's putative right under the First Amendment to display go-go girls. The city cross-appeals that determination. That the city relied only on its authority under the police power to zone businesses dealing in "adult" material – some of which may or may not be entitled to First Amendment protection – does not constitute an abandonment of the First Amendment issue. We do not rest our decision in this case on the First Amendment because we do not need to: the Twenty-first Amendment compels the result, thus preempting the First Amendment issue. Finally, we categorically reject the suggestion in footnote 6 of the dissent that our view of the applicability of the First Amendment turns on "a personal distaste for Walker's go-go dancing." *Post* at 36 n.6. This is simply not true. While no judicial opinion can hope to

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III.

Although we do not decide the question whether the Founding Fathers had "exotic dancing" in mind when they penned the First Amendment, our decision need not rest on a holding that go-go dancing is not protected speech, for Walker intended to establish such dancing in a bar. This zoning ordinance "come[s] to us, not in the context of censoring a dramatic performance in a theater," but rather in a context of regulating the activities that may be conducted at the Last Chance Lounge, a bar licensed to sell liquor by the drink.[13] *California v. LaRue*, 409 U.S. 109, 114 (1972).

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be value free, nor should it be, we think the pertinent values are those found in the text of the First Amendment, and it is by those values (as well as by the relevant decisions of the Supreme Court) that our discussion of this issue has been guided.

[13] From the inception of this litigation Walker has claimed that the zoning ordinance violates the First Amendment only as the ordinance applies to him. Whether the ordinance could be construed to violate the First Amendment rights of anyone else – prospective proprietors of "go-go" dance facilities that are not licensed to dispense liquor by the drink, for example – therefore is not before us. Nonetheless, we cannot help observing that the great leeway the Supreme Court has accorded local governments in their attempts to deal with the secondary effects of so called "adult" establishments suffices to shield this ordinance from a facial attack in any event. In *City of Renton v. Playtime Theaters*, the Supreme Court stated, "[A] majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of

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States have authority under the Twenty-first Amendment to impose an almost limitless variety of restrictions on drinking establishments such as the Last Chance Lounge.[14]

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such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place and manner regulations." 475 U.S. 41, 49 (1986) (footnote omitted). After finding that the zoning restrictions placed on "adult" theaters in that case concerned "vital governmental interests," 475 U.S. at 50, the Court stated that "[c]ities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. . . . '[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' " 475 U.S. at 52 (quoting *Young v. American Mini Theaters*, 427 U.S. 50, 71 (1976) (plurality opinion)). Even if we were to assume that some of the activities encompassed by the District C-X classification in the Kansas City zoning ordinance were entitled to some First Amendment protection, the ordinance is surely within the range of solutions we must give the city "a reasonable opportunity to experiment with."

[14] To the extent that its laws do not conflict with those of the state of Missouri, Kansas City possesses all the powers that the state has the authority to confer. *See* Mo. Const. art. VI, § 19(a); Kansas City, Mo., Charter § 1 (1986). "[The] state Liquor Control Act [of Missouri] does not attempt to preclusively regulate but, on the contrary, specifically authorizes municipalities to enact ordinances, consistent with the state law, regulating wholesalers and retailers of alcoholic beverages." *Passler v. Johnson*, 304 S.W.2d 903, 907 (Mo. 1957). And, in fact, the Kansas City Charter authorizes the city "[t]o restrain, regulate or prohibit the manufacture, sale or giving away of any wines, intoxicating or malt liquors." Kansas City, Mo., Charter § 1(51). *See generally Chestnut Inn v. Johnson*, 297 S.W.2d 576 (Mo. Ct. App. 1957) (sustaining order of Kansas City Liquor Control Board of Review, which suspended city

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> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97, 110 (1980). Faced with "concrete case[s]" remarkably similar to the present one, the Supreme Court has deferred to the State's power to regulate.

Thus, for example, in *California v. LaRue*, the Court sustained California liquor regulations that prohibited, among other things, the exposure of any portion of a person's genitals or anus, whether live or depicted in films or pictures, in any establishment licensed to sell liquor by the drink. 409 U.S. 109, 111-12, 118-19 (1972). Although the California regulations concerned slightly

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permit to sell alcoholic beverages for ten days due to gambling on premises where alcohol was sold, in violation of city ordinance).

It is irrelevant that we deal here with the Plans and Zoning Committee of the City Council and with the Council itself rather than, say, a Liquor Licensing Board. It is the City Council that has the power to ban "exotic dancing" in bars, and the particular procedural devices or types of committees the Council employs to deal with such activities are of no constitutional significance.

more explicit displays of human body parts than those that call the Kansas City zoning ordinance into play[15] – go-go girls in Kansas City must at least cover their genitals and areolas – the *LaRue* Court's reasoning extends well beyond the facts of that case. The Court explained:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

409 U.S. at 114.

Some years later the Court upheld, in a *per curiam* opinion, a state law that prohibited not only the display of human genitals and anuses but also the display of any portion of a female breast below the areola in establishments where alcohol was consumed on the premises. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 714 n.1, 715 (1981). Again, the Court relied on the state's regulatory dominion over the sale of alcohol: "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." 452 U.S. at 717.

These cases make clear that Kansas City could have altogether forbidden any number of activities from taking

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[15] It is also true, however, that the Kansas City ordinance only applies to live acts.

place in the Last Chance Lounge,[16] not the least of which is "exotic dancing" as defined in section 39.156 of the zoning ordinance. And as the greater power to ban the sale of alcoholic beverages includes the lesser power to regulate their sale, the greater power to totally prohibit exotic dancing in bars includes the lesser power to consider permitting such dancing in bars on a case-by-case basis.

Walker simply has no First Amendment right to display "go-go girls" in a drinking facility. His First Amendment rights cannot, therefore, have been violated by this zoning ordinance, and we thus reverse the decision of the District Court in favor of Walker on his First Amendment claim.[17]

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[16] *See, e.g., Chestnut Inn v. Johnson*, 297 S.W.2d 576 (Mo. Ct. App. 1957).

[17] The dissent argues that we are without authority to consider the State's power under the Twenty-first Amendment in this case because the city has relied on its authority to zone rather than its authority to regulate drinking establishments. In our view, however, to ignore the city's clear authority to prohibit exotic dancing in bars under the *Larue* line of cases would be on the order of rejecting a search and seizure claim on grounds of reasonableness in a case in which the perpetrator was not a state actor. That the city presented us with a brief that could fairly be described as less than stellar and inexplicably ignored the *Larue*, *Bellanca*, and *Iacobucci* cases does not relieve us of responsibility to announce the law, particularly where the issue itself – if not the dispositive case law – was, in fact, raised before the District Court and argued on appeal.

As this Circuit stated less than two years ago, "we have a responsibility to conform our decision to the law as we see it."

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The dissent, *post* at 35-36, suggests that our decision smacks of "judicial legislation." In our view, we would be guilty of "judicial legislation" if we were to uphold the District Court's First Amendment ruling striking down the challenged zoning ordinance when there has not been a clear showing of a constitutional violation. Here, we do

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Pfoutz v. State Farm Mut. Auto. Ins. Co., 861 F.2d 527, 530 n.3 (1988). In that case "the district court made no reference to Mo. Stat. § 307.010 and the parties did not raise the statutory provision prior to oral argument [where it was raised by the panel]" but the Court stated that nevertheless "we rely on [that] statute." Our rationale for deciding that case on the basis of a statute cited by neither of the parties applies equally to the case before us today: "Our reliance on the Missouri motor vehicle statute raises no new issue in this case, but rather *suggests another theory to use in resolving the issues raised by the parties.*" *Id.* (emphasis added). We also stressed that the new theory injected into the case by the Court was, as here, of a legal rather than factual nature. *Id.* In our view, to ignore the Supreme Court's decisions in the *Larue* line of cases in the present case would amount to a denial of our responsibility to conform our decision to the law.

Moreover, to give such a narrow interpretation to the issues preserved for review in this case as to exclude discussion of the Twenty-first Amendment would be a great injustice to the people of Kansas City. Assuming the city would not prevail under the cases cited in its brief, we would be punishing the people of Kansas City because their attorneys failed to push the right buttons in a highly complex and shifting area of the law. Courts, including if not especially the Supreme Court, have decided cases on the basis of issues not raised in many contexts, but have been particularly prone to do so in this area of the law. *See FW\PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 624 (1990) (Scalia, concurring in part, dissenting in part) (citations omitted); *see generally Singleton v. Wulff*, 428 U.S. 106, 121 (1975).

just the opposite: we refuse to strike down the ordinance because it is apparent that what the city has done is well within the safe harbor afforded by the Twenty-first Amendment. In refusing to allow the city and its taxpayers to be held liable for a non-existent constitutional violation, we believe we are applying the law rather than creating it and are adhering to the proper role of the judiciary in our country's system of government. As the city has not committed any violation of the Constitution, the relevant views as to the merits of coupling go-go dancing with the serving of alcohol in a public bar are not those of the judges on this particular panel, but those of the people of Kansas City as expressed through their chosen representatives – and, which were, incidentally, also expressed in this case by the people of the affected neighborhood themselves, with some fervor and regularity during the hearings on Walker's application. The view of the people of Kansas City, as reflected in the Council's action on Walker's application, is that Walker should not be permitted to display go-go girls in his bar, and we hold that the Constitution does not require otherwise.

IV.

A.

Walker also claims that defendants violated his rights to both procedural and substantive due process in the treatment of his application for rezoning. Procedural due process is based on the words of the Due Process Clause of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." Walker therefore must assert a

life, liberty, or property interest in obtaining the Council's permission to display go-go girls at the Last Chance Lounge. The source of "substantive due process" is somewhat more obscure, and the legitimacy of the doctrine has been long debated. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Griswold v. Connecticut*, 381 U.S. 479, 508-10 (1965) (Black, J., dissenting); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-26 (1857) (Curtis, J., dissenting). Unlike its eponym, substantive due process refers not to process at all, but to substantive rights. To make out a substantive due process claim, Walker must show that the law violated one of his fundamental rights, which no amount of process could repair. We say this not to be gratuitously pedagogic, but because it is not entirely clear which due process arguments Walker made in the District Court and consequently which arguments are properly before us for review.

In his memorandum in support of his motion for a preliminary injunction and his application for a temporary restraining order, Walker stated that he was making a procedural due process claim based on a liberty interest in displaying go-go girls at the Last Chance Lounge. His description of the state action as "the City Council's enactment of Zoning Ordinance Section 39.156,"[18] however, makes sense only as part of a substantive due process claim. The District Court described Walker's claim as resting on a property-based procedural due process right, but employed substantive due process cases in its analysis. On appeal, Walker asserts a procedural due process

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[18] Plaintiff's Memorandum in Support at 18.

right grounded on a liberty interest as well as a substantive due process right. If a recitation of the due process arguments that have been raised and discussed thus far in this case were a statute it would be void for vagueness.

While we are loath to review a claim that appears not to have been preserved for appeal, it is unclear to us which claims have and which have not been so preserved. And in this case we are even more loath to fashion a procedural bar to a review of the merits for fear of inducing yet more litigation of this matter. Moreover, unlike any decision we may make regarding which of the various due process claims have, in fact, been preserved for review, the merits of the case are clear: under no theory of either procedural or substantive due process is Walker entitled to relief. We will consider in turn each due process claim arguably raised in the proceedings below.

B.

Assuming Walker adequately pleaded a procedural due process right grounded in both liberty and property interests, as well as a substantive due process right to display go-go girls at his bar, his claim fails. The strongest of his due process theories is that which the District Court supposed him to have made, and which the court properly rejected: a procedural due process right based on a property interest in having the City Council approve his application for rezoning.

Before due process protections will attach, Walker "clearly must have more than an abstract need or desire for [receiving the benefit]. He must have more than a

unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Nothing in the Kansas City ordinance entitled Walker to believe that the City Council would – much less must – approve his application.

The zoning ordinance establishes various hoops an applicant for C-X zoning must jump through to be minimally eligible for the zoning change, but leaves entirely to the discretion of the City Council the determination to grant or deny the proposed rezoning. The only guidepost available to the City Council in making this decision is found in the opening statement of the "Purpose" section of the zoning ordinance, which reads: "In the interpretation and application of the provisions of this Chapter, such provisions shall be held to be the minimum requirements adopted for the promotion of the health, safety, morals, or the general welfare of the community." Kansas City, Mo., Zoning Ordinance § 39.340 (1987). Taking this statement to be more precept than shibboleth, it still places loose reins on the Council's discretion – far looser reins than even those state regulations that the Supreme Court has held to lack the requisite "substantive limitations" necessary to call the Due Process Clause into play. "[R]egulations [that] place no substantive limitations on official discretion . . . create no . . . interest entitled to protection under the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). An evaluation of whether granting a particular rezoning application request would advance, for example, "the general welfare of the community" is, at its most concrete, "subtle and depend[ant] on an amalgam of elements, some of which are factual but many of which are purely subjective

appraisals." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9-10 (1979).[19] And there are absolutely no standards, guidelines, or procedures to aid the Council in deciding whether to grant an application for C-X zoning.[20]

Precisely because the zoning ordinance "place[s] no substantive limitations on official discretion," *Olim*, 461 U.S. at 249, it does not obligate the City Council, as a constitutional matter, to afford Walker any particular process: nothing could be shown that would compel the City Council to grant an application for C-X zoning. If the zoning ordinance so limited the discretion of the City Council that a constitutionally protected property interest were created, then holding hearings ad infinitum without ever calling Walker's application to a vote might violate the due process requirement that the hearing be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). But the ordinance, far from so limiting the Council, leaves it with unfettered discretion. Although the ordinance provides

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[19] Although both *Greenholtz* and *Olim* concerned liberty rather than property interests, the Court has not distinguished between these interests in applying the principle that a certain degree of discretion in the hands of the decisionmaker must defeat claims to due process. *See, e.g., Board of Pardons v. Allen*, 482 U.S. 369, 381-85 (1987) (O'Connor, J., dissenting); *United States v. Von Neumann*, 474 U.S. 242, 252 (1986) (Burger, C.J., concurring in part); *Bishop v. Wood*, 426 U.S. 341, 356 n.1 (1976) (White, J., dissenting); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972).

[20] *Cf. Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) ("The . . . statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement.").

for a hearing on applications for C-X zoning, there can be no due process right to an expeditious disposition of the subject matter of a hearing that is held as a matter of grace, rather than as a matter of constitutional requirement. It is the very discretion Walker complains of that defeats his due process claim based on an asserted property interest in C-X zoning. We therefore affirm the District Court's rejection of this claim.

Walker's other procedural due process claim – that he had a "liberty" interest in establishing go-go girls at the Last Chance Lounge – also lacks merit. Walker contends that because his desire to display almost-nude dancing girls in his bar constituted an attempt to exercise his constitutionally protected right of free speech, any limitation Kansas City placed on his ability to so proceed encroached on his liberty, thereby calling the Due Process Clause into play. We disagree. This sort of peep-show entertainment would not rise to the level of a liberty interest when presented in a drinking establishment even if we accepted Walker's interpretation of the First Amendment. For the reasons stated in Part III of this opinion, Walker's conception of the constitutional status of go-go girls runs headlong into the state's power under the Twenty-first Amendment to trump Walker's hypothetical First Amendment rights. Kansas City would have acted within constitutional bounds had it banned go-go dancing outright in establishments licensed to sell liquor by the drink. Walker, therefore, has no protected liberty interest in gaining permission to display go-go girls at the Last Chance Lounge and he was due no constitutionally mandated process in the City Council's consideration of his application.

C.

Nor does Walker's interest in go-go girls attain the rank of a "substantive due process right." Although "emanations" from the "penumbras" of the Bill of Rights have been found to protect an expansive array of activities not obvious to the casual reader of the Constitution,[21] we can find no "emanation" that would encompass the right to have go-go girls perform in one's bar. The "substantive due process" mantra (or some variation on the theme of constitutional rights that do not owe their existence to any particular language in the text of the Constitution) has been invoked to shelter fundamental individual rights from governmental interference in the areas of child rearing and education,[22] family relationships,[23] procreation,[24] and marriage.[25] It is difficult to

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[21] *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

[22] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding compulsory public education for children an encroachment on the fundamental right of parents to direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state statute prohibiting the teaching of any modern language except English in elementary schools violates same fundamental right).

[23] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right to live with one's grandmother violated by city housing ordinance limiting residents of single dwelling unit to members of immediate family); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (recognizing a right in the parent or guardian of a child to control the child's religious education).

[24] *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a right to abort her fetus in some circumstances); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state law forbidding the sale of contraceptives to married couples violates the right to marital privacy).

[25] *Loving v. Virginia*, 388 U.S. 1 (1967) (holding anti-miscegenation laws a violation of the Due Process Clause).

imagine an interest more directly at antipodes from these interests than that asserted by Walker in this case.[26] Indeed, the "teachings of history" and the "basic values . . . under[lying] our society" that have informed the Court's discovery of "substantive due process" rights[27] militate rather strongly against a fundamental right to promote the entertainment envisioned by Walker.[28]

To examine the most expansive expositions on the idea that the Due Process Clause protects fundamental freedoms that are not specified in the Constitution is to demonstrate forcefully that no "substantive due process" right is to be found in the display of go-go girls in a bar.

> [T]hrough the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.

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[26] *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

[27] *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

[28] *Cf.* Model Penal Code § 213.5 comment.

> Exposure of one's private parts to public view constituted a common-law misdemeanor. . . . The proscribed conduct [in modern state statutes] usually focuses upon exposure of one's private or intimate parts, although a number of recent revisions more narrowly prohibit display of a "sex organ" or of other specifically named areas of the body.

Id. at 406 & 409 (footnotes omitted).

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Walker's desire to engage go-go girls at the Last Chance Lounge is not one of "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[29] It therefore is not protected by substantive due process.

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[29] Faced with a claim similar to Walker's, the Supreme Court has written:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' . . . "
>
> Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Paris Adult Theater I v. Slaton, 413 U.S. 49 at 65-66 (1972) (citations omitted).

V.

We hold that the Kansas City zoning ordinance challenged here is well within constitutional bounds. Because of the state's broad powers under the Twenty-first Amendment, Walker's First Amendment right to display go-go dancers in his bar, assuming *arguendo* the existence of such a right, has not been violated. We therefore reverse the District Court's judgment for Walker on his First Amendment claim. The District Court's injunction against the application of the ordinance to Walker and its award of nominal damages and attorney fees are, therefore, vacated. Our reversal of the judgment for Walker on his First Amendment claim moots his claim for compensatory damages and makes it unnecessary for us to reach the issues raised by Walker concerning the District Court's denial of compensatory damages. In all other respects, the challenged rulings of the District Court, including its rejection of Walker's due process claims, are affirmed.

Affirmed in part and reversed in part.

DUMBAULD, Senior District Judge, concurring.

Since the panel is unable to join in a unanimous opinion, it may be helpful if I state my own views respecting how I regard the issues involved.

The case at bar is essentially a zoning or land use case. Appellant seeks to change the existing use at the location of his establishment from a bar *simpliciter*, selling liquor by the glass for consumption on the premises, to an establishment so selling liquor plus providing go-go dancing. This automatically thereupon becomes a case

subject to regulation by the city's zoning authority under its broader powers conferred by the Twenty-first Amendment.

That is true whether counsel talks about the Twenty-first Amendment or not. Naturally he will talk more about the new feature being added (just as a car salesman will stress the new anti-locking brakes rather than the time-tested rugged engine) but, *ex necessitate rei* the force of the Twenty-first Amendment necessarily comes into the picture.

I am satisfied that, as stated above, the facts of the case automatically invoke application of the Twenty-first Amendment. As the old maxim says, the law arises from the facts – *ex facto oritur jus*.

The facts of the case show that the setting and environment involve not the abstract issue whether dancing is speech, but whether in a barroom setting the City possesses broadened[1] regulatory authority to act against the evils consequent upon such a situation. These are substantial evils, arising from the synergistic impact of nudity and liquor together. They are colorfully described by Chief Judge Rehnquist in his opinion for the Court in *Larue*.[2]

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[1] It was pointed out in *California v. Larue*, 409 U.S. 109, 114 (1972), that "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals [traditionally within the scope of the police power]."

[2] 409 U.S. at 111.

This case on its plain facts involves not a ballet in a theatre but in the context of a barroom environment with interaction between the dancers and customers,[3] and the City does have adequate regulatory power under *Larue* and also under *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1986).[4] These authorities are adequate, in my view, to support our decision.

Hence, in the case at bar I think we cannot escape the force of an Amendment to the Constitution. It is a part of the Supreme Law and we must apply it. So I am agreeable to relying on the Twenty-first Amendment as our *ratio decidendi*.[5]

Judge Bowman's opinion, as I interpret it, firmly rests the decision on these authorities. He also in note 13 cites the cases permitting zoning (either by concentration or dispersion) of "adult" entertainment as a proper method of allocating land use. The Supreme Court thus recognized First Amendment concerns as not necessarily controlling but simply one peripheral element to be considered in the balancing decisions regarding the appropriate use of a particular tract.

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[3] *See* 409 U.S. at 114.

[4] It is well established "that a State has broad powers under the Twenty-first Amendment to regulate the times, places *and circumstances* under which liquor may be sold." [Italics supplied].

[5] *See also Singleton v. Wulff*, 428 U.S. 106, 121 (1976); and *FW/PBS. Inc. v. City of Dallas*, 110 S. Ct. 596, 624 (Scalia, J).

I therefore concur in Part III of his opinion,[6] and in the judgment of reversal in part, and affirmance in part.

LAY, Chief Judge, dissenting.

I respectfully dissent. In my view, the majority improperly reaches issues not raised by the parties, and then erroneously resolves those issues.

The only issue raised by the City on cross-appeal is whether the district court applied the proper standard of review to the City Council's actions. The City did not, in either the district court or in this court, challenge the first amendment status of Walker's proposed entertainment.[1] The primary difficulty I have with the majority's opinion is that it fails to decide the issues before us and then

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[6] With respect, I regard part II as massive *obiter dictum*, or in his own pithy phrase "gratuitously pedagogic." To a lesser degree, the same is true of part IV. I view the invocation of due process by appellant as merely a vehicle for making the First Amendment applicable to local governments under the doctrine of "selective incorporation." No substantial claim is presented of delay amounting to denial of justice in the sense of article 40 of Magna Carta. *See* J. C. Holt, *Magna Carta* (1965) 326-27.

[1] To the contrary, before this court, the City appears to concede the first amendment status of Walker's proposed entertainment: "The City Council is not required to suspend its role in land use planning while considering a proposal to rezone an area adjacent to an extensively used park *even though the proposal involves expression that is protected by the First Amendment.*" Appellee's Br. p.40 (emphasis added); *see also id.* p.36 ("constitutionally protected form of expression"). This concession is arguably an even stronger justification for not reaching the first amendment issue than is the failure to raise the issue.

reaches out to decide issues that were not briefed or argued to this court. The opinion in Section II discusses in ten pages why the Kansas City ordinance as applied to go-go dancing should not deserve first amendment protection. It concludes, however, that it is not necessary to decide the case on this basis because the City was within its authority to deny Walker's application under the 21st amendment.[2] Not only is the discussion on the first amendment advisory and pure dicta, it is also clearly wrong.

First, the majority relies on dicta from the Supreme Court to suggest that nude dancing is not protected by the first amendment. I suggest this dicta is no more persuasive than the Supreme Court's statement in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which the majority dismisses as "unadulterated dicta." Second, I believe the *Schad* dicta is stronger and more persuasive than the majority recognizes. The Court began its analysis in *Schad* by noting: "Here the Borough totally excludes all live entertainment, *including non-obscene nude dancing that is otherwise protected by the First Amendment*." 452 U.S. at 68 (emphasis added). Third, *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), does not apply to this case since it is not a free speech case, but a freedom of association claim. Finally, no other circuit court of which I am aware has

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[2] I find surprising the majority's reasoning for not reaching the first amendment issue: "Walker has suggested no theory under which we could find his go-go girls expressive of something protected by the first amendment." Maj. op. at 17. Walker logically suggested no "theory" since he assumed, as did the City, that the first amendment status of the proposed entertainment was not at issue.

deprived entertainment businesses of first amendment protection for dancing.[3] The en banc Seventh Circuit has recently passed on this issue, and until there is authority to the contrary, it seems to me the Seventh Circuit's opinion should be followed. *See Miller v. Civil City of South Bend*, No. 88-3006/3244 (7th Cir. May 24, 1990).

However, my judicial concern relates to the majority's holding that the land use ordinance, which the district court found unconstitutional under rules of prior restraint, may be upheld under the 21st amendment.[4] This will be startling news to the City as well as to Walker since this issue was never raised before the City Council, or factually discussed by Council members, or asserted in the district court, or briefed or argued by the parties in this court. The records of the City Council proceedings do not contain one word or reference to liquor regulation or the authority of the City to deny Walker's permit because the proposed entertainment was to take place in a facility serving liquor. The City Council's failure to consider this authority is not surprising because this case does not

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[3] *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (recognizing first amendment status of barroom nude dancing); *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (same); *Leverett v. City of Pinellas Park*, 775 F.2d 1536, 1540 (11th Cir. 1985) (same).

[4] The 21st amendment reserves for the states the authority to regulate "[t]he transportation or importation into any state- * * * for delivery or use * * * intoxicating liquors." U.S. Const., amend. 21.

relate to the regulation of liquor, but is a zoning case relating to land use.[5]

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[5] Even if I could agree that this issue was properly raised for our consideration, I have doubts about the majority's resolution of the issue. I recognize that states possess authority to regulate liquor sales and distribution. *See, e.g., New York Liquor Auth. v. Bellanca,* 452 U.S. 714 (1981); *California v. LaRue,* 409 U.S. 109 (1972). The majority's application of the 21st amendment in this case, however, when the City is not even attempting to regulate liquor, expands the 21st amendment far beyond the scope of the authority that the Supreme Court has recognized. I therefore find the majority's representation that this case is "remarkably similar" to the Supreme Court's precedents on this subject, maj. op. at 18, unbelievable. Cases such as *Bellanca, LaRue,* and *Lanier v. City of Newton, Ala.,* 842 F.2d 253 (11th Cir. 1988) illustrate the context in which 21st amendment authority should be upheld: Where the regulatory authority finds that the combination of liquor and certain forms of entertainment leads to conduct deemed undesirable. *See Bellanca,* 452 U.S. at 718 (city chooses to avoid disturbances associated with mixing alcohol and nude entertainment); *LaRue,* 409 U.S. at 111 (evidence established incidents of prostitution, rape, and assault occurring in or near bars offering nude entertainment); *Lanier,* 842 F.2d at 255 (town council found nudity and alcohol led to undesirable behavior). The City Council in this case was not even remotely concerned with regulating liquor. In this context, I find persuasive the reasoning of *Southern Entertainment Co. of Fla., Inc. v. City of Boynton Beach,* 736 F. Supp. 1094 (S.D. Fla. 1990), in which the court pointed out the 21st amendment is applicable only where the sale of liquor in conjunction with nudity is regulated rather than simply regulating the nudity. Here, the City Council did not express any attempt to regulate liquor, or identify any possible alleged evils associated with the combination of liquor and nudity. The City Council's action was simply a reaction to the proposed nudity. Although the Supreme Court has not adopted this reasoning, it has recognized that the states' 21st amendment authority is not without limits. *See, e.g.; City of Newport, Ky. v. Iacobucci,* 479 U.S. 92, 94-95 (1986); *id.* at n.5.

It is popular these days to urge that appointed judges should not engage in "judicial legislation." I am not sure what that phrase means but it has always been popular to assert that judges should not make the law, but should simply interpret it. This aphorism overlooks the very nature of judicial work in that when judges decide cases they do make law. I assume that those who urge that judges should not legislate really mean that judges should not engage in policymaking decisions as legislatures and city councils have the power to do or inject their own personal views as legal doctrine.[6] The criticism directed towards judges legislating is seldom justified as it overlooks five fundamental differences between judicial review and legislation.

First, judges are required to review cases only under the grant of authority provided by the Constitution or legislation. Second, judges do not decide hypothetical or advisory cases, but must confine themselves to actual or

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[6] The majority, in its dicta discussion of the first amendment, portrays a personal distaste for Walker's proposed go-go dancing. This calls to mind the following verse:

> His good has no nuances. He
> Doubts or believes with total passion.
> Heretics choose for heresy
>
> Whatever's the prevailing fashion.
> Those wearing tolerance for a label
> Call other views intolerable.

Phyllis McGinley, *In Praise of Diversity* (reprinted in Kuh, Foolish Figleaves? Pornography in - and out of - Court at 175 (1967); *see also Miller*, No. 88-3006/3244 (Posner, J., concurring) (giving first amendment protection to nude dancing strikes judges as ridiculous due in part to personal beliefs.)

real controversies between parties who have standing or an interest in the litigation. Third, judges are confined to the factual record before them. Fourth, on appeal, judges will review only those issues that are decided in the district court and that are briefed and argued on appeal. Fifth, the very essence of judicial duty is to avoid deciding constitutional questions unless absolutely necessary.

I respectfully submit that the majority opinion offends these basic canons governing judicial review. I therefore dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-1001

Joe E. Walker, Jr., d/b/a Last Chance Lounge,

Appellant,

v.

City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

No. 89-1057

Joe E. Walker, Jr., d/b/a Last Chance Lounge,

Appellee,

v.

City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp,

Appellants.

Filed: November 30, 1990

Before LAY, Chief Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges.

The suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of majority of active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge John R. Gibson dissent from the denial of the petition for rehearing en banc.

The petition for rehearing is also denied.

JOHN R. GIBSON, Circuit Judge, with whom LAY, Chief Judge, and McMILLIAN, Circuit Judge, join, dissent from denial of rehearing en banc.

I respectfully dissent from the denial of rehearing en banc in this case. The panel opinion decides a case that simply never was. While Walker has operated the Last Chance Lounge as a bar for some fifteen years, this case does not implicate any regulation of his business under the City liquor regulations. Walker did not make an application of any kind under the ordinances regulating liquor establishments. There is no doubt that liquor regulations could be drafted to apply to the conduct that Walker sought to have approved for his lounge, but that is not the case before us, nor was it the case before the City Council. It was only incidental that Walker operated a lounge or liquor establishment when he applied under the zoning ordinances for approval to employ exotic dancers.

The record is clear that Walker applied for a zoning classification that would permit him to employ go-go girls. He applied for the permit under section 39.152 of the Kansas City Zoning Ordinance. That section does not deal with liquor establishments, but rather has a far different reach, dealing with adult book stores, entertainment facilities and theaters, bath houses, massage shops, modeling studios, artist body painting studios, and exotic dance facilities. The Zoning Committee of the City Council held a series of hearings and the full Council finally acted on this zoning application. Walker's litigation challenged the validity of the zoning ordinance.

It was thus a zoning case that the City Council and its committee addressed. It was a zoning case that the district court considered. At no stage of this controversy in the City Council, its committee, the district court or this court, did the parties raise the issue of liquor regulations, or of the twenty-first amendment. The briefs before this court made no reference to the twenty-first amendment. Now, suddenly, for the first time in the entire history of this controversy, the twenty-first amendment springs forth in the panel opinion. Someday the twenty-first amendment may be a legitimate issue in a case such as this, as it has been in cases before other courts in the past, but the twenty-first amendment is not the issue in this case.

The decision violates the cardinal principle that we do not consider constitutional arguments unless they are first considered by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (reversing an Eighth Circuit decision, the Court upheld "the general rule that a federal appellate court does not give consideration to issues not raised below"); *Greyhound Lines. Inc. v. Morrow*, 541 F.2d 713, 724 (8th Cir. 1976) (stating that "[i]t is old and well settled law that issues not raised in the trial court cannot be considered by this court"). This court has on countless occasions invoked the rule with respect to both constitutional and other issues. *See Cato v. Collins*, 539 F.2d 656, 662 (8th Cir. 1976) (refusing to consider claim that Arkansas statute was unconstitutional); *Rogers v. Masem*, 788 F.2d 1288, 1292 (8th Cir. 1985) (refusing to consider first amendment claim not raised or considered in district court); *Hodgson v. Minnesota*, 853 F.2d 1452, 1466 (8th Cir. 1988) (en banc) (refusing to consider equal protection

challenge not raised at trial); *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988) (refusing to consider constitutional challenge of statute raised for first time in post trial motion); *Lourdes High School v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 446 (8th Cir. 1989) (refusing to consider equal protection challenge to state statute not raised in the district court or considered in rule); *Freeman v. Ferguson*, No. 89-1405, slip op. 7-10 (8th Cir. Aug. 6, 1990) (dissent, Magill J.) (arguing against reversal of "the district court on a ground which it never had an opportunity to consider"). Every judge on this court has, at one time or another, authored or joined in opinions invoking this rule.

The Supreme Court, in *Singleton v. Wulff*, recognized that there may be exceptions to this rule, such as "where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.' " 428 U.S. at 121. These exceptions were not satisfied in *Singleton* nor do they have application in the instant case. The panel's reliance on *Pfouts v. State Mutual Automobile Ins. Co.*, 861 F.2d 527 (8th Cir. 1988), is misplaced, because the statute in question there was discussed in oral argument and in supplementary letter briefs. The court, in *Pfouts*, explained that the statute it considered raised no new issue but simply suggested another theory useful in resolving the issues raised by the parties. *Id.* at 530 n.3.

The panel's statement that the city attorneys simply "failed to push the right buttons," *Walker v. City of Kansas City*, No. 89-1001, slip op. at 22 n.17 (8th Cir. August 7, 1990), so as to raise or discuss the issue it enthusiastically pulls into the case, deprecates the ability of highly experienced lawyers in the Kansas City Attorney's Office, a

substantial legal department consisting of twenty-two lawyers. The Kansas City Metropolitan Bar Association, 1990 Directory 27.

The panel opinion finds its strongest support for application of the twenty-first amendment in *California v. LaRue*, 409 U.S. 109 (1972), a case which dealt with regulations of the California Department of Alcoholic Beverage Control prohibiting sexually oriented entertainment in bars and nightclubs. Unlike this case, *LaRue* simply does not deal with zoning regulations. The panel opinion's dismissal of this distinction as "irrelevant" is nothing short of abandonment of its duty to examine this issue.

The parties were entitled to have the first amendment issues that were litigated in the district court and that were the subject of argument before the panel decided on the merits. Instead, they received a lengthy discussion, which the authoring judge concedes is "dicta," *Walker*, slip op. at 12 n.17, and may be mistaken for "gratuitous pedagogy," *id.* at 24. It was an expression of opinion of one judge, which failed to get another supporting vote. We shirk our responsibility when we refuse to frankly face the issue presented in a case before us. Perhaps the views in the dicta of the authoring judge, in all the semantic excess and exhilaration, unconsciously propelled the panel to its decision on the issue that was not before it. Certainly our court does not act in a desire to avoid facing such an issue, but our decision today makes it appear that we have done just that.

Admittedly the issue is one that has many emotional overtones, as is demonstrated by *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir.), *cert. granted*, 59

U.S.L.W. 3243 (1990). In that case the Seventh Circuit en banc considered the application of the Indiana public indecency statute to nude dancing, and filed six separate opinions revealing a court sharply divided on the basis of personal beliefs, cultural views, philosophies or innate convictions as much as on legal issues. The Supreme Court's grant of certiorari in *Miller* demonstrates the significance of the only issue that is squarely presented in the case. We should grant rehearing and hold this case until the Supreme Court has given us guidance on the issue that was presented and litigated.

LAY, Chief Judge, with whom McMILLIAN, Circuit Judge, joins, dissenting, specially, from the denial of rehearing en banc.

I deem it unfortunate that the court refuses to grant a rehearing en banc in this case. I believe that en banc procedures should be used sparingly on any Court of Appeals. *See United States v. Arpan*, 887 F.2d 873, 879 n.2 (8th Cir. 1989) (en banc) (Lay, C.J., dissenting). Federal Rule of Appellate Procedure 35 stresses that en banc cases should be heard only when necessary to seek uniform decisions or when a question is exceptionally important. Here the issue is one of exceptional importance. The important question is *not*, perhaps, as some might think, whether go-go dancing is a form of expressive speech protected under the First Amendment. The district court held that it is protected speech and only Judge Bowman in his opinion argues that it is not. Neither Judge Dumbauld nor I agree with his rhetorical disdain of go-go dancing and the protection it has enjoyed as expressive conduct. Regardless of this disagreement, the issue, now of course, is before the Supreme Court. *See Miller v. Civil*

City of South Bend, 904 F.2d 1081 (7th Cir.), *cert. granted*, ___ U.S. ___ (1990).

We should grant a rehearing en banc in the present case because it is the first case in the history of the Eighth Circuit wherein we *reverse* a district court on grounds that were (1) not factually engaged in by the parties before the City Council, (2) not passed upon by the City Council, (3) not asserted in the district court, and (4) not briefed or argued before this court. As Judge Gibson artfully puts it in his dissent "the panel opinion decides a case that simply never was." The holding in this case overrules the well-settled law of this circuit that we do not pass upon issues that are not before us. (See cases cited by Judge Gibson's dissent). If this is, in itself, not a precedent which is of exceptional importance and which provides an unsettling conundrum for future judicial review in this court there is even a more important reason for hearing the case. Our court injects into the factual background of this case, on pure hypothesis, a constitutional ruling under the Twenty-first Amendment, never considered or relied upon by the parties before the City Council. Judge Dumbauld in his concurring statement urges that "we cannot escape the force of an amendment to the Constitution. It is part of the supreme law and we must apply it."[1]

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[1] Judge Dumbauld does little justice to his cited "old maxim" – that "the law arises from the facts – *ex facto oritur jus*." The facts, as passed upon by the district court, do not relate to liquor licensing but to a land use ordinance and whether the City Council may invoke it to exercise, by prior restraint, a ban on expressive conduct. This factual background provided the adversarial arguments before the City Council and the district court. The case has nothing to do with liquor licensing or the Twenty-first Amendment.

I respectfully submit this is startling doctrine indeed. Such an approach to judicial review would require an appellate court to review the entire United States Constitution in every decision. It would require the court to determine whether there are issues of equal protection, due process, Sixth Amendment, Fifth Amendment, Fourth Amendment, etc., that *might be* applicable to the case even though they have not been raised by the parties. The Supreme Court of the United States has never subscribed to such a freewheeling doctrine of law. *Cf. e.g. Illinois v. Gates*, 462 U.S. 213, 217 (1982) (rejecting discussion of a "good faith" defense to the exclusionary rule because it had not been raised in the Illinois courts); *Knetch v. United States*, 364 U.S. 361, 370 (1960) (equal protection claim raised by amicus curiae but not discussed since "not raised by the parties"); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 293 (1977) (Stewart, J., dissenting) (stating that "[b]ecause the petitioner has not raised any constitutional challenge in this case, there is no occasion to consider what limits, if any, the Due Process Clause of the Fifth Amendment imposes on the power of Congress to qualify or foreclose judicial review of agency action"). We disserve jurisprudential doctrine when the court creates a supposed justiciable issue out of thin air.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOE E. WALKER, JR., d/b/a LAST CHANCE LOUNGE, Plaintiff,	)	No. 87-0939-CV-W-8
vs.	)	FILED JAN 21 1988
CITY OF KANSAS CITY, MISSOURI, et al., Defendants.	)	

ORDER

Plaintiff in the above-styled case filed a three-count complaint against the City of Kansas City, Missouri; Richard L. Berkeley, the Mayor of Kansas City, Missouri and each of the individual members of the City Council of Kansas City, Missouri. Each individual defendant is sued in his or her official capacity. Plaintiff's complaint alleges that the various defendants violated his constitutional rights in refusing to classify his tavern as a C-X zoning district so that he could introduce a form as entertainment known as "go-go dancing" to his business. The case is currently before the court on defendants' motion to dismiss each of the individual defendants.

The parties apparently agree that the decision of whether to make the zoning change is a "legislative" act. Defendants contend, therefore, that the individual defendants are immune because they were acting in their legislative capacities. Plaintiff argues, however, that because he sued the individual defendants in their official, rather

than personal, capacities, no immunity exists. Plaintiff's argument must fail, however, since the Eighth Circuit has specifically stated that municipal legislators have absolute immunity. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613 (8th Cir. 1980). *See also Westborough Mall v. City of Cape Giradeau* [sic], *MO*, 693 F.2d 733 (8th Cir. 1982), *cert. denied sub nom. Drury v. Westborough Mall*, 461 U.S. 945 (1983).

Plaintiff's claim that the holding in *Gorman* only applies when a legislator is sued in his or her personal capacity is simply not true. The court specifically framed the issue in *Gorman* as an "official immunity question." *Id.* at 611. Further, the court noted that the immunity only applies if the legislator was performing a "legislative act." The result urged by plaintiff is incongruous since an individual cannot be acting in his or her personal capacity if performing a "legislative" act. Finally, the court noted that an important consideration in its holding was that several other checks existed to insure that a plaintiff still had a remedy. For example, the court noted that a zoning determination could be challenged as being arbitrary or capricious or could be declared invalid on constitutional grounds. *Id.* at 613. The court also noted that a willful deprivation of constitutional rights is punishable under 18 U.S.C. § 242, the criminal analog of 42 U.S.C. § 1983. *Id.* (citiations [sic] omitted).

The *Gorman* court also relied on the Supreme Court's decision in *Owen v. City of Independence*, 445 U.S. 222 (1980). In *Owen* the Supreme Court specifically stated that one reason that municipalities did not have qualified immunity was that since most government officials enjoyed some form of qualified or absolute immunity

"many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." 445 U.S. at 651. In other words, a plaintiff maintains a remedy against the municipality even if the individual legislators are immune from suit. The legislators still have an incentive to act within the law since "[t]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651-52 (footnote omitted).

The Eighth Circuit's decision in *Gorman* was recently followed in *Hope Baptist Church of Castle Point v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216 (E.D. Mo. 1987). The court there noted that a local official acting in his or her legislative capacity, was "absolutely immune from damage liability" for a zoning decision. *Id.* at 1221. In addition, a number of other courts have followed the Eighth Circuit's lead in holding that an individual is absolutely immune from suit if acting in his or her legislative capacity since the plaintiff still has a remedy against the municipality. *See, e.g., Wagner v. Genesee County Board of Commissioners*, 607 F. Supp. 1158 (D. Mich. 1985); *Searingtown Corp. v. Incorporated Village of North Hills*, 575 F. Supp. 1295 (E.D.N.Y. 1981). Accordingly, it is

ORDERED that defendants' motion to dismiss the individual members of the City Council is granted. The

City of Kansas City, Missouri remains as the sole defendant in this case.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES DISTRICT JUDGE

January 21 1988

APPENDIX D

[Reported at 691 F.Supp. 1243 (W.D.Mo. 1988)]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JOE E. WALKER, JR. d/b/a Last Chance Lounge, Plaintiff,	)	No. 87-0939-CV-W-8
vs.	)	FILED JUN 28 1988
CITY OF KANSAS CITY, MISSOURI, Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Joe Walker brought this suit against the city of Kansas City, Missouri alleging that his constitutional rights were violated when the city, after a long delay, denied his application for C-X zoning. Walker wants to have go-go dancers at his bar and the city requires C-X zoning for establishments with "exotic dance" facilities. A hearing was held on plaintiff's motion for a preliminary injunction after which the parties submitted post-trial briefs and agreed that the preliminary injunction hearing could be consolidated with the trial on the merits in accordance with Fed. R. Civ. P. 65(a)(2). Plaintiff reserved his right to a subsequent hearing on the issue of damages, however. Thus, this memorandum opinion and order addresses the issues involved in plaintiff's request for an injunction but leaves open the issue of appropriate relief for determination at a later date.

Plaintiff has owned the Last Chance Lounge for approximately fifteen years. The lounge, which is located at the northeast corner of Noland Road and 350 Highway, currently operates as a cocktail lounge. The area surrounding the lounge contains a mixture of commercial and residential establishments. A park, with several baseball diamonds used by people of all ages, is in the vicinity of the lounge. Bruce Fowler, the city planner who worked on the application, testified that the Blue River acts as a natural buffer, separating the park from the Last Chance Lounge.

Plaintiff testified that business had been terrible in the three-to-four-year period preceding 1985. As a result, he informally canvassed his customers[1] to determine if they would like go-go dancers at the bar. Response to this poll was extremely positive and, as a result, Walker decided to apply for the necessary zoning change. Section 39.156 of the Kansas City, Missouri Zoning Ordinance provides that an exotic dance facility[2] must have C-X

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[1] Plaintiff testified that the individuals patronizing the lounge were approximately ninety-eight percent white males from working class backgrounds. He stated that some people did visit the lounge in suits and had professional backgrounds. Most of the business was from "regulars," however, and he did not receive much drop-in business from the highway.

[2] Go-go dancing falls under the ordinance's definition of "exotic dancing." The ordinance defines exotic dance facility as "any building, structure or facility which contains, or is used for commercial entertainment, where the patron directly or indirectly is charged a fee to observe specified anatomical areas, provided that the genitals and pubic area of all persons and the areola and nipple of the breasts of all female persons

(Continued on following page)

zoning. C-X zoning is an "overlay" zoning category which exists in connection with some other category of zoning. Under the city's zoning ordinance, C-X zoning may only be established in C-2 (local retail business district), C-3 (intermediate business), and C-4 (central business district) zones. The Last Chance Lounge is located in an area zoned C-2.

In addition to the limitation on the types of zoning C-X may overlay, certain geographical limits exist on its use. C-X zoning may not be established "within 1000 feet of any church, school or area zoned for residential use" nor will "more than two of the uses[3] regulated by this section . . . be located within 1000 feet of each other." The ordinance provides, however, that these two limitations may be waived if the person applying for the waiver files a petition with the City Plan Commission "which indicates approval of the proposed regulated use by 51% of the persons residing or owning property within a radius of 1000 feet of the location of the proposed use." Walker

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(Continued from previous page)

are opaquely covered." "Specified anatomical area" is further defined as "less than completely or opaquely covered (a) Human genitals, pubic region, (b) Buttocks, (c) Female breast area below to a point immediately above the top of the areola." It has been assumed by both parties that the activity which plaintiff desires to have in his lounge would be "exotic dancing" within the ordinance's definition. In his post hearing memorandum, plaintiff admits this fact.

[3] In addition to exotic dancing, C-X zoning is required for the operation of adult book stores, adult entertainment facilities, adult theatres, bath houses, massage shops, modeling studios, and artists-body painting studios.

filed a legally sufficient waiver petition with the City Plan Commission.

On April 1, 1986 Bruce Fowler, the planner in charge of the project, issued the staff report recommending that the city council approve the rezoning. The report stated that

> [t]he staff feels that the subject site is one of the more suitable locations in the city for a C-X district to be established. It is on a major artery in a relatively isolated area with small businesses and distinct boundaries along the highway and with few residences in the immediate vicinity.

On April 18, 1986 the ordinance recommending the rezoning had its first reading before the city's Plans and Zoning Committee. No opposition to the proposal was presented at this time. On the same date John W. Laney, director of the City Development Department, filed an "Ordinance Fact Sheet" on the proposed zoning. That fact sheet notes that Walker filed the waiver petition required when a proposed use is located within 1000 feet of property zoned for residential uses. The fact sheet contains a section for staff comments where Laney noted that

> in reviewing this request, the staff is aware that the City Council, by establishing the C-X district in the zoning ordinance, determined that C-X uses are appropriate in Kansas City. Therefore, the criteria used to review the suitability of the subject property must not be such that they would rule out every site in Kansas City.

The matter was next brought before the Plans and Zoning Committee on May 7, 1986, when it was put on hold until the May 14, 1986 meeting. At the May 14

meeting the committee voted to put the matter on semi-annual hold. As a result, it was not considered again until January 15, 1987 when the committee recommended that the matter be continued on hold. On January 16, 1987 the city council adopted the committee's recommendation and the matter was again placed on hold. Approximately five months later, at the May 28, 1987 meeting, the committee again recommended to put the matter on hold.

Shortly after the May 28 meeting Jackson County filed a petition of protest against the ordinance pursuant to section 39.355 of the Zoning Ordinance. This section provides that when a legally sufficient petition of protest has been filed about a proposed zoning change, a favorable vote of three-fourths of the members of the city council is required to approve the change. On June 19, 1987, three days after it was filed, the city's law department ruled that the petition of protest was legally sufficient. The City Development Office determined that the petition was legally sufficient on June 26, 1987. On July 8, 1987 the city council's docket committee recommended that the matter again be put on indefinite hold and the city council adopted this measure at its meeting on July 9, 1987.

On August 6, 1987 a second reading of the ordinance was scheduled in front of the committee. This reading was prompted by City Council Rule 28 which provides that "[a]ll ordinances and resolutions must be reported by a committee within twenty days after the date of reference therein." If the ordinance is not so reported, any member of the counsel may call the matter out and it will be placed on the docket at the next meeting for a second reading.

A week later, on August 13, 1987, the city council began to consider the proposed rezoning. While the city council members discussed a number of issues, debate on the proposal centered on whether the council should vote on Walker's application at the August 13 meeting or put the matter on hold for one week. The fact that the city had not yet completed its proposed Land Use Plan for the area where the Last Chance Lounge was located caused some city council members to argue for another hold until the plan was completed. Those advocating a hold believed that a vote should not be taken on the ordinance until the council knew whether it would be in a better legal position if it waited to decide the issue until after the Land Use Plan had been developed. Council members opposing the hold argued that the council was going to defeat the measure in any event and should take a vote at the August 13 meeting rather than continue to postpone consideration of the issue.[4] The city council voted to hold the matter for one week while it sought legal advice

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[4] Several council members made comments directly relating to the fact that they did not believe C-X zoning should ever be granted. For example, Councilman Bryant stated that "I'm against this no matter what anybody's plan says, and it really doesn't matter, I'm here to urge each of you to vote against C-X zoning in the Fifth District and against it in Kansas City at all." Transcript (Tr.) of Proceedings at 2. Mr. Sharp stated "if we want to keep it killed, not just make a big show of voting no today, and opening ourselves up for a lawsuit that we could lose, we're going to hold it up till December 17 when we have that Land Use Plan." *Id.* at 4. Mr. Lewellen stated "I have to agree with Councilman Sharp. He's made a very responsible argument for something I believe the majority of [us] want to do and that's to keep sleeze and slime out of our districts and out of our area." *Id.*

about the ramifications of voting on the proposal before the Land Use Plan was approved. At the August 20 meeting the city council decided to put the matter on hold until December 17, 1987, when the Land Use Plan for the area would be finished.

At the December 17 meeting the city council voted against passage of the ordinance and, as a result, Walker is not permitted to have exotic dancing at the Last Chance Lounge. He argues that the numerous delays leading up to the ultimate city council vote constitute a violation of his constitutional right to due process under the fifth and fourteenth amendments of the United States Constitution and that the ordinance as applied to him constitutes a violation of the first amendment of the Constitution. Although the court does not believe that the city council violated Walker's rights under the due process clause, it does conclude that the ordinance, as applied to Mr. Walker, constitutes a prior restraint in violation of the first amendment. The basis for each of these decisions is discussed below.

I. Due Process Claims

Walker argues that the numerous delays leading up to the December 17, 1987 city council vote and the council's decision to deny his request for rezoning constitute a violation of his due process rights under the fifth and fourteenth amendments. This argument must fail for a number of reasons. First, it is clear that when considering the propriety of zoning ordinances courts must defer to legislative judgment "[i]f the validity of the legislative classification for zoning purposes [is] fairly debatable

. . . . " *Village of Belleterre v. Boraas*, 416 U.S. 1, 4 (1974) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Specifically, the Supreme Court has noted that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). The court noted that "such inquiries into congressional motives or purposes are a hazardous matter" since "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates the scores of others to enact it . . . . " *Id.* at 383-84.

Under this reasoning, plaintiff's argument that the city council violated his due process rights by denying him the C-X zoning and by using the Land Use Plan as a subterfuge for the real reason behind the denial must fail. The mere fact that some councilmen stated that they did not believe that C-X zoning should ever be enacted is not enough to invalidate the statute.

Perhaps because he recognizes that the court cannot consider what motivated city council members to vote a certain way, plaintiff primarily argues that the council's denial of his application was arbitrary and capricious. "While arbitrary and unreasonable application of zoning ordinances is a subject for judicial inquiry, if the municipal zoning action is fairly debatable, the court cannot substitute its opinion for that of the legislative body." *Home Building Co. v. City of Kansas City*, 609 S.W.2d 168, 171 (Mo. App. 1980). *See also Hope Baptist Church v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1218 (E.D. Mo. 1987) ("Regarding real property, substantive due process

guarantees the rights of a property owner to be free from arbitrary or irrational zoning actions.").[5]

Walker has not proven that the decision to deny his rezoning application was not fairly debatable. Indeed, the city council engaged in heated debate as to whether the city would be in a better position to consider the permit after the Land Use Plan had been developed for the area. This court cannot find, as plaintiff requests, that the Land Use Plan debate was merely a pretext to cover the arbitrary nature of the proceeding, especially since the city council specifically went into executive session to consider the legal issues involved in voting on the proposed rezoning prior to adoption of the Land Use Plan. Thus, Walker's argument that he was denied due process because the city denied his application for arbitrary reasons cannot stand.

In addition to the fact that the decision was "fairly debatable," plaintiff has failed to present a procedural due process claim because he has not shown that he had a legitimate property interest in the zoning change. The

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[5] While the *Hope Baptist Church* court noted that there may be a substantive, as well as procedural, due process guarantee in zoning decisions, the Eighth Circuit has held that "whether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit and need not be decided." *Lemke v. Cass County, Nebraska*, to be reported at 846 F.2d 469, ___ (8th Cir. 1987). By finding that the question of substantive due process protections was an open one, the court in *Lemke* implicitly held that its earlier decision in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) was deprived of any precedential value. In *Littlefield*, the court held that "the denial of a building permit under some circumstances may give rise to a substantive due process claim."

Supreme Court has clearly held that procedural due process protections apply only to "interests that a person has already acquired in specific benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). The court explained that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Legitimate property interests are not created by the Constitution but "are defined by existing rules or understandings that stem from an independent source such as state law . . . . " *Id.* at 577. Thus, "a person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke without a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

Plaintiff has not established that he has a protected property interest that would trigger procedural due process protections under the fifth or fourteenth amendments. The mere fact that an individual believes he should be awarded a particular license[6] and is then denied that license is not enough to trigger procedural due process protections. *See, e.g., Gold Cross Ambulance and Transfer and Standby Service, Inc. v. City of Kansas City*, 705 F.2d 1005, 1016-17 (8th Cir. 1983), *cert. denied*, 471 U.S.

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[6] The court recognizes that plaintiff was applying for rezoning, rather than a particular license or permit. As discussed *infra* at 17, however, the court believes that the rezoning application is functionally equivalent to an application for a license or permit.

1003 (1985) ("Unilateral expectation of being awarded a license is insufficient to sustain [a] procedural due process claim."). At the hearing Walker testified that he was never told he would receive the C-X zoning classification. He stated only that he complied with the provisions of the zoning ordinance and waited for an answer. This unilateral expectation of a zoning classification is not a protectable property interest for procedural due process purposes.

Walker also argues that the city violated his due process rights by continually delaying the vote on his rezoning application. Mere delay by a city legislative body, however, is not enough to prove that a particular zoning decision was arbitrary and, consequently, a violation of the due process clause. *Home Building Co.*, 609 S.W.2d at 170. Plaintiff in *Home Building* sought a declaratory judgment that the city had arbitrarily applied a zoning ordinance which regulated the location of "community unit projects."[7] Plaintiff had met all of the requirements of the ordinance and had made certain modifications requested by the city plan commission. Plaintiff's application was filed on June 1974 and the city plan commission recommended approval in November 1974. *Id.*

The plan was then sent to committee where it remained for several months. During this time nearby property owners protested the proposal. *Id.* It was not until December 1976, more than two years after the city

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[7] A community unit project is a mixture of single and multifamily structures.

plan commission had referred the plan to the committee, that a vote was taken recommending approval. *Id.* The city council did not vote on the proposal until February 1977 when "[i]nexplicably . . . it failed to pass." *Id.* While noting that the evidence, including the fact that the plaintiff had complied with all necessary requirements, was "strongly indicative of arbitrary action by the council," the court refused to grant plaintiff's motion for summary judgment. In so holding, the court noted that

> the sole basis in evidence to warrant this result [overturning the decision of the legislative body] is the processing history of the application as presented to the city plan commission and the council and its committee without any facts showing what considerations of public and private interests were weighed in reaching the results recorded. . . . [T]he company cannot prevail on summary judgment because the record does not contain the vital details of facts used by the legislative body in its decisionmaking process." *Id.* at 174.

Similarly, the court in the present case does not know what details prompted the initial delays in considering Walker's application. The court does know, however, that the last four-month delay was attributable to the council's decision to put the application on hold until the Land Use Plan had been developed. Thus, the court cannot find that the initial delay between June 1985 and August 1987 was arbitrary since it does not know what reasons prompted the delay. Similarly, the city presented evidence[8] that the change was "fairly debatable" and, as a result, this court can find no due process violation.

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[8] *See supra* at 5-6 for a discussion of whether the city had legal reasons to await development of the Land Use Plan.

II. First Amendment Claims

Although the city did not violate Walker's due process rights in denying his rezoning application, the court believes that Walker has proven that the zoning ordinance, as applied to him, acted as an unconstitutional prior restraint on his first amendment rights. As the discussion below indicates, the fact that the court is construing the city council's decision to deny a certain zoning category, a decision usually left to the discretion of the legislature, does not change the court's first amendment analysis.

The Supreme Court has recognized that "[e]ntertainment, as well as political and ideological speech, is protected" under the first amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). *See also City of Renton v. Playtime Theatres*, 106 S. Ct. 925 (1986) (adult motion pictures protected by first amendment); *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (adult motion pictures protected by first amendment); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (musical theatrical production protected by first amendment). Since an entertainment program may not "be prohibited solely because it displays the nude human figure," nude dancing is protected expression under the first amendment. *Schad*, 452 U.S. at 66. If nude dancing is entitled to first amendment protections then go-go dancing would also be entitled to protection since the dancers would be partially clothed.

It must be noted, however, that the fact that a particular form of expression falls under the umbrella of first amendment protections does not mean that the state lacks

power to regulate the expression. *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (identifies standards which must be used in regulation of obscene material). This power to regulate protected expression includes a city's right to enact zoning ordinances that limit the location of certain establishments, such as go-go dancing facilities, provided that the ordinance is "rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property." *Schad*, 452 U.S. at 68. Thus, the Supreme Court has held that "[t]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young*, 427 U.S. at 62.

While the Supreme Court has recognized that expression protected by the first amendment may be regulated, the court has also noted that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn. . . . " *Schad*, 452 U.S. at 68. Indeed, "the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Id.* at 77 (Blackmun, J. concurring). *Accord People Tags, Inc. v. Jackson County Legislature*, 636 F. Supp. 1345, 1351 (W.D. Mo. 1986). Therefore, the general prohibitions against prior restraints apply to the C-X zoning ordinance at issue in the present case. In other words, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, indefinite [sic] standards to guide the licensing authority,

is unconstitutional." *Shuttlesworth v. City of Birmingham, Alabama*, 394 U.S. 147, 150-51 (1969).

Any statutory scheme that acts as a prior restraint on protected expression bears "a heavy presumption against its constitutional validity." *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Since prior restraints are presumed to be invalid, a system containing a prior restraint must have "procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Id.* at 559. *See also Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965).

Ordinances which give city officials broad discretion must have "narrow, precise and objective standards" to guide the decision if the ordinance regulates conduct falling under the first amendment. *Conlon v. City of North Kansas City*, 530 F. Supp. 985, 988 (W.D. Mo. 1981). No such procedural protections exist in the present case. The ordinance which establishes C-X zoning gives total discretion to the city council to approve or deny an application which has met all relevant criteria. As a result, the ordinance is unconstitutional.

In *Little v. City of Greenfield*, 575 F. Supp. 656 (E.D. Wisc. 1983), plaintiffs wished to open a nude dancing establishment. The applicable city ordinance required that they obtain a special use permit and an entertainment license to use their land for that purpose. Like the zoning ordinance at issue here, the Greenfield ordinance required that an individual wishing to obtain a special use permit had to submit a petition to the city. The petition was then referred to the City Plan Commission

which makes a recommendation for approval, approval with conditions, or disapproval.[9] *Id.* at 660. The City Plan Commission is directed to base its recommendation on three factors: (1) that the use intended is appropriate for the general character of the zoning district; (2) that the proposed use is compatible with adjoining developments; (3) and that the council consider any other matters which may be pertinent to the requested use. *Id.* Final decision making power rests with the common council.

The court held that the Greenfield ordinance was invalid because

> [s]pecial use permits are issued in the final analysis only on Common Council approval. The ordinance specifies no standards whatever to guide the Common Council's decision. The Common Council may act exclusively upon the findings of the Plan Commission, but it is not required to do so. Moreover, the Common Council is not obliged under the ordinance to consider the three abovementioned factors governing Plan Commission review.

Id. at 663. *See also Zebulon Enterprises v. Dupage County*, 496 N.E.2d 1256 (Ill. App. 1986) (County's zoning ordinance which regulated adult movie theatres was unconstitutional "because it did not include narrow, objective, and definite standards to guide the licensing authority." The court specifically found that the requirement of objective standards applied to legislative, as well as administrative, bodies.).

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[9] Unlike the Kansas City zoning ordinance, the Greenfield zoning code requires that the City Plan Commission act on the petition within thirty days of the petition's receipt.

Defendant argues that the above cases are inapposite because they concern the approval or denial of licenses or special use permits rather than rezoning applications. The court believes that this distinction is one without a difference since the effect of the C-X zoning procedure is that an individual cannot have go-go dancing unless the city council grants his application for a C-X overlay zoning designation. In other words, an individual wishing to have any form of entertainment covered by the C-X zoning on his premises must apply to the city to gain approval. Although this approval is not technically in the form of a license or special use permit, an individual is unable to proceed with his plan unless the approval is given. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) (situation where individual has the power to waive requirements of statute "whenever necessary" is almost identical to a "license" for the dissemination of ideas); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 504 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (procedure which requires that adult movie theatres acquire a permit while other movie theatres do not need such a permit is a "[s]pecial use mechanism [which] is operationally similar to the licensing procedure").

Although a license is not technically required for Mr. Walker to have exotic dancers at the Last Chance Lounge, the C-X overlay zoning operates in the same manner as a license. In this case Walker complied with all of the requirements necessary to obtain a C-X zoning overlay. The City Plan Commission recommended that the city council approve the zoning and specifically noted that the location of the Last Chance Lounge was the type of

location where C-X zoning was thought to be appropriate. Despite this recommendation the city council denied Walker's application without any apparent reason.[10] Indeed, several council members specifically noted that they did not believe C-X zoning would ever be appropriate in any location. These statements were made despite the fact that the city council had previously decided, by enacting the ordinance, that C-X zoning should be allowed in certain locations.

Considering these facts, the court concludes that the C-X zoning ordinance operates as a prior restraint upon Mr. Walker's protected first amendment right to have exotic dancers at the Last Chance Lounge. The ordinance is unconstitutional as applied to Mr. Walker because it does not contain any clear, objective standards for the council to use in determining whether to approve a rezoning application. While the court will not spell out in this opinion what these standards should be, it notes that they

> must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made or discretion to be exercised by the appropriate licensing official. In other words, the decision to grant or deny the license application must be virtually a ministerial one.

Conlan, 530 F. Supp. at 988 (quoting *Swearson v. Meyers*, 455 F. Supp. 88, 91 (D. Kan. 1978)) (emphasis omitted).

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[10] Bruce Fowler testified that, to the best of his knowledge, Walker's application for C-X zoning is the only one that has been brought before the city's Plans and Zoning Committee.

Since the current zoning ordinance gives more than ministerial discretion to city council members in determining whether to authorize C-X zoning, it is a prior restraint which violates the first amendment of the Constitution.

Nor has the Supreme Court announced any specific standards which would operate to make a prior restraint on first amendment expression constitutional. In a recent opinion the Supreme Court invalidated a Lakewood, Ohio ordinance which required that newspaper companies obtain a license before placing newspaper vending machines on public property. *City of Lakewood v. Plain Dealer Publishing Co.*, 56 U.S.L.W. 4611 (June 17, 1988). The Lakewood ordinance required that the Mayor, the individual who had discretion to grant or deny the license, had to state the reasons for his decision. *Id.* at 4617. The Court noted, however, that the ordinance did not require any degree of specificity nor were there any limits to the reasons the Mayor could use as a basis for the denial. As a result, the Court found that "[s]uch a minimal requirement cannot provide the standards necessary to ensure constitutional decision-making, nor will it, of necessity, provide a solid foundation for eventual judicial review." *Id.* The court finds a similar shortcoming with the city's C-X zoning ordinance.

While the court today finds that Walker's first amendment rights have been violated, it will not decide the scope of injunctive relief to be granted until a hearing is held on the issue of damages. At that hearing counsel for both parties should be prepared to present evidence on the proper form and scope of injunctive relief as well as on plaintiff's monetary damages (if any). Accordingly, it is

ORDERED that plaintiff's motion for injunctive relief and damages is granted. The exact scope of this relief shall be determined at a hearing to be held on Monday, July 11, 1988, at 10:00 a.m. in Courtroom No. 1.

/s/ Joseph E Stevens Jr
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

June 28, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOE E. WALKER, JR., d/b/a Last Chance Lounge, Plaintiff,	)	No. 87-0939-CV-W-8
vs.	)	
CITY OF KANSAS CITY, MISSOURI, Defendant.	)	Filed JUN 28 1988

ORDER

The following changes should be made in the court's order of June 28, 1988:

1. The sixth line on page 4 should read "its first reading before the council."

2. The fifteenth line on page 5 should read "scheduled. This reading was prompted. . . . "

3. The nineteenth line on page 5 should read "reported, any member of the council may call the matter out. . . . "

IT IS SO ORDERED.

/s/ Joseph E Stevens Jr
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

June 28, 1988

APPENDIX E

[Reported at 697 F.Supp. 1088 (W.D.Mo. 1988)]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JOE E. WALKER, JR., d/b/a Last Chance Lounge, Plaintiff,	)	No. 87-0939-CV-W-8
vs.	)	Filed OCT 20 1988
CITY OF KANSAS CITY, MISSOURI, Defendant.	)	

ORDER

On June 28, 1988 this court issued a memorandum opinion and order finding that the city's C-X zoning ordinance was unconstitutional as applied to plaintiff Joe E. Walker, Jr. On August 3, 1988 the court held an evidentiary hearing on the proper scope of injunctive relief and on the issue of damages. Oral argument on the legal issues concerning the proper relief was held on September 2, 1988. The court has considered both the evidence and legal arguments presented by counsel at these two hearings and this order announces the court's holding in regard to the issues of damages and injunctive relief.

The facts giving rise to this case were discussed in detail in the court's June 28 order and need not be repeated here. *See Walker v. City of Kansas City, Missouri*, 691 F. Supp. 1243 (W.D.Mo. 1988). In that order the court held that the city's C-X zoning ordinance, which regulates the location of various forms of adult entertainment,

including go-go dancing, was unconstitutional as applied to Walker because the ordinance did not contain any objective standards for the city council to use in determining whether C-X zoning was appropriate in a particular location. Walker seeks injunctive relief and $250,000 in anticipated lost profits for the violation of his first amendment rights.

I. Injunctive Relief

Injunctive relief is a proper remedy for violation of a constitutional right when a plaintiff makes a showing of irreparable harm and inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). Once a plaintiff proves these two elements a "court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation." *Newman v. State of Alabama*, 683 F.2d 1312, 1319 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

Use of an injunction is especially appropriate in situations where zoning ordinances have been declared unconstitutional. As the Tenth Circuit Court of Appeals has noted

> [i]f the zoning ordinance is void . . . the properties intended to be affected thereby are unzoned and the property owners may proceed with any other lawfully intended use. In such cases, the court is limited to the remedy of declaring the zoning ordinance void and finding that the property owner affected is entitled to use his property for any lawful purpose without regard to the void zoning ordinance.

Carter v. City of Salina, 773 F.2d 251, 255 (10th Cir. 1985). This remedy is appropriate in situations where an ordinance has been declared unconstitutional on its face or where the ordinance is invalid as applied to a specific piece of property, as in the present case. *Id.* Courts in this district have consistently held that a permanent injunction is a proper remedy in situations where an invalid zoning ordinance has violated a business' or individual's first amendment rights. *See, e.g., People Tags, Inc. v. Jackson County Legislature*, 636 F. Supp. 1345 (W.D. Mo. 1986) (court granted permanent injunction after finding that county ordinances regulating the location of adult movie theatres and bookstores were content-based regulations which violated the first amendment); *Conlon v. City of North Kansas City, Missouri*, 530 F. Supp. 985 (W.D. Mo. 1981) (court issued permanent injunction against city after finding that city ordinance regulating solicitation for charitable or religious purposes was unconstitutionally vague because it gave impermissible discretion to city officials to determine whether solicitation permits would be issued).

At the September 2, 1988 oral argument the city attorney conceded, in response to a question from the court on the scope of injunctive relief, that in view of the court's holding in this case and his reading of the applicable case law an injunction against enforcement of the ordinance at Mr. Walker's location may be appropriate. The city attorney stated, however, that it was his belief the injunction should last only for the period that plaintiff maintains his leasehold interest in the property on which the Last Chance Lounge is located. The court agrees that in light of the June 28 order the city must be

enjoined from enforcing the C-X zoning ordinance as to Mr. Walker. The court disagrees, however, with the city attorney's interpretation that the injunction may last only as long as Mr. Walker maintains his leasehold property interest.

Since the city may not enforce the C-X zoning ordinance against Walker, he may now have go-go dancing at the Last Chance Lounge. Thus, if the city adopts a new zoning ordinance at some future date, Walker's use of the property would become a nonconforming use. All zoning ordinances must contain a provision exempting existing nonconforming uses from their operation. *City of Monett, Barry County v. Buchanan*, 411 S.W.2d 108 (Mo. 1967). *See also People Tags*, 636 F. Supp. at 1356 (adult bookstore, which had been in operation six days before the passage of one ordinance and almost a month before the passage of another was an existing nonconforming use); *Boyce Industries v. Missouri Highway and Transportation Commission*, 670 S.W.2d 147, 150 (Mo. App. 1984) ("All zoning restrictions are required to exempt from their immediate operation existing nonconforming uses.").

It is well-recognized that

> [a] transfer or change of ownership is not an abandonment of the right to a nonconforming use. Thus, a noncomforming use may be transferred to a successor in title. Similarly, a lessee has the same right to use premises for a nonconforming use as was vested in the prior lessor or tenant.

P. Rohan, 6 *Zoning and Land Use Controls* § 41.03[6] at 41-93 to 41-95. Thus, assuming Walker begins to provide go-go dancing entertainment at the Last Chance Lounge,

the bar will become a nonconforming use. The right to continue the nonconforming use is not personal to Walker but, rather, runs with the land.[1] Thus,

> [t]he fact that the nonconforming use was carried on by a tenant and that it is now contemplated to lease the land to a new tenant is not controlling. The right to continue the nonconforming use, once established and not abandoned, runs with the land and this right is not confined to any one individual or corporation. A vested right, unless abandoned, to continue the nonconforming use is in the land.

Eitnier v. Kreitz Corp., 172 A.2d 320, 323 (Pa. 1961). *See also Amico v. New Castle County*, 101 F.R.D. 472, 483 (D. Del. 1984), *aff'd without opinion*, 770 F.2d 1066 (3d Cir. 1985) (vested right in nonconforming use exists if permitholder has made "some substantial expenditure, obligation or change in relation to land" even if the nonconforming use has not actually begun); *Beasley v. Potter*, 493 F. Supp. 1059, 1071 (W.D. Mich. 1980) ("A party does not acquire a protected interest in a nonconforming use of property unless he can show nonconformance in a reasonably substantial manner."); Rohan, *supra*, cases cited at footnotes 104-106. As a result, once plaintiff begins business as a go-go dancing bar he will have a vested right in the nonconforming use, a right which runs with the land. Therefore, the court will grant plaintiff's request for a

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[1] Of course, if the use is abandoned or discontinued a different situation would arise.

permanent injunction without imposing any limitations on that injunction.[2]

II. Damages

Plaintiff, three current or former owners of go-go dancing bars, and Fred Zimmerman, a private investigator with extensive experience in the city's liquor and amusement control department, testified at the August 3, 1988 hearing. Plaintiff attempted to establish, through the testimony of each of these witnesses, the amount of profits that could have been made had he been permitted to have go-go dancers at the Last Chance Lounge beginning in April 1986 when the City Plan Commission approved his application for C-X zoning and recommended that the city council approve the zoning.

Missouri courts have held that an individual may recover the anticipated profits of an *established* business " 'only when they are made reasonably certain by proof of actual facts, with present data for a rational estimate of their amount; . . . ' as shown by 'proof of the income and expenses of the business for a reasonable time anterior to its interruption, with a consequent establishing of the net profits during the previous period.' " *All Star Amusement, Inc. v. Jones*, 727 S.W.2d 930, 931 (Mo. App. 1987) (quoting

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[2] The court cannot definitively rule on whether go-go dancers could continue to perform at the location if a change of ownership or lessor should occur since that situation is not currently before the court. The court includes this discussion not to announce a definitive rule of law but to explain why it does not believe it would be appropriate to place limitations on the injunction, as suggested by the assistant city attorney.

Coonis v. Rogers, 429 S.W.2d 709, 714 (Mo. 1968)). While it is difficult for an established business to prove anticipated profits, "[a] new business labors under a greater burden of proof in overcoming the general rule that evidence of expected profits is too speculative, uncertain, and remote to be considered and does not meet the legal standard of reasonable certainty" since a new business has no past record upon which to base the figures. *Handi Caddy, Inc. v. American Home Products Corp.*, 557 F.2d 136, 139 (8th Cir. 1977).

In *Handi Caddy*, the court specifically noted that while Missouri law does not preclude a new business from recovering lost profits, an individual or corporation attempting to recover such profits must meet a greater burden of proof than would an established business. Thus, in order for a plaintiff to recover anticipated lost profits he must establish "actual facts, with data for a rational estimate [of the anticipated profits'] amount." *Id.* at 139. *See also Rich v. Eastman Kodak Co.*, 583 F.2d 435, 437 (8th Cir. 1978) (individual attempting to establish anticipated profits must show "continuing, average and stable basis for the projection; otherwise his playing with figures is too speculative and conjectural to sustain any verdict"). In addition, the Missouri Court of Appeals has noted that anticipated profits will not be awarded where the profits "depend on the business skill or ability of a person . . . because no method exists to enable a rational estimate or calculation of profits generated by the skill or ability." *Brown v. McIbs, Inc.*, 722 S.W.2d 337, 341 (Mo. App. 1986). An exception exists to this general rule, however, if the individual seeking the profits presents "proof of actual facts which present data for a rational estimate

of what profits are attributable to a particular individual." *Id.*

Under the court's holding in *Brown*, plaintiff must produce evidence of that portion of the bar's profits that directly result from his management abilities. No such evidence was proffered. Although Walker testified to his extensive experience operating the Last Chance Lounge and other similar establishments, he admitted that he has no experience managing a go-go facility. The uncontroverted evidence at the hearing was that the profits realized by a go-go dancing bar depend greatly on the individual managing the bar. For example, Cletis Kankey, the owner of AB's Lounge, testified that his bar lost a significant amount of money due to an ineffective manager. He stated that after he fired the manager in 1984 it took about two years for the bar to return to the level at which it had previously operated. In addition, Shirley Barry, the former owner of Balloons (now known as Angelina's), testified that one reason she sold the bar to Kay Stark,[3] was that go-go dancing establishments are difficult to run and that the women who dance at the bars can sometimes be difficult individuals with whom to work. Barry's testimony indicates that the skills necessary to manage a "traditional" bar are not necessarily transferable to a go-go dancing bar.

Even if Walker had convinced the court that a portion of his management abilities would directly contribute to the profitability of the Last Chance Lounge, he has not met his burden of establishing actual facts which would

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[3] Stark also testified at the hearing. *See, infra*, at 10.

make the amount of his anticipated profits reasonably certain. Fred Zimmerman, the private investigator hired by plaintiff, testified about his visits to three go-go dancing bars: AB's Lounge, Club Michael's and the Pink Garter.[4] While Zimmerman established that bars with go-go dancing were able to sell drinks at a higher price than those establishments without such entertainment,[5] his testimony did not come anywhere close to reinforcing Walker's testimony that the Last Chance Lounge could operate at twenty-five percent capacity and that Walker could therefore base his lost profits on the number of drinks he would sell per hour to thirty people.[6]

Zimmerman testified that although he never entered AB's Lounge, he observed seven cars in front of the bar and seven cars on 79th Street when he drove past AB's on two occasions. Zimmerman visited Club Michael's on three occasions, actually entering the lounge only once, on July 20 at 1:45 p.m. when four customers were present.[7] His visit to the Pink Garter Lounge on July 28, 1988

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[4] Each of these bars had go-go dancing before the C-X zoning ordinance was enacted and, therefore, was grandfathered into the present ordinance.

[5] All of the bar owners who testified corroborated this testimony.

[6] Capacity is approximately 120 people.

[7] On July 29 he drove past Club Michael's at 1 p.m. and observed four cars in front of the bar and one customer standing by the bar's entrance. He drove by later that day at 4:30 p.m. and noticed twenty-three cars in the lot while at 8 p.m. he noticed twenty-nine cars in the lot and four motorcycles. Although Zimmerman testified that the club has a capacity of 185 people the court cannot determine at what percentage

(Continued on following page)

at 12:30 p.m. revealed that ten customers were patronizing the bar. He drove by at the same time on July 29 and observed ten cars in the lot.

The testimony of Stark, the current owner of Angelina's, is somewhat more helpful to plaintiff. She testified that her bar had a capacity of 110 people and that her average crowd was twenty to twenty-five customers, an occupancy rate between approximately 18 and 23 percent, although sometimes she was packed and other times business was slow. She added that there was no set rule for occupancy and that sometimes Monday evenings were faster than Friday evenings. In arguing that an award of lost profits should be based on a 25 percent occupancy figure, plaintiff relies heavily on Stark's testimony that she believed Walker would do better at his location than she was able to do at hers since she is located in a high crime area.

This evidence does not convince the court that plaintiff has proved with "reasonable certainty" the amount of his anticipated profits. The number of customers which Zimmerman observed at the three lounges he investigated does not come anywhere near the number of customers which Walker testified he anticipated would patronize the Last Chance Lounge. Although Kay Stark had an occupancy rate closer to that which Walker testified he believed he would have, her testimony does not

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(Continued from previous page)

occupancy the bar operated since there is no evidence of how many people were in each car or that the occupants of these cars were actually Club Michael's customers.

clearly establish that Walker would successfully achieve a twenty-five percent occupancy rate. In addition, Walker's testimony that he had approximately five calls a day after news stories of this lawsuit appeared in the paper does not establish that each of these individuals would actually visit the Last Chance Lounge. There was no evidence presented that each of the phone calls came from a different individual nor that the individuals would visit the bar more than once after the "novelty" of the bar diminished.[8]

In short, this court holds that plaintiff did not prove his anticipated profits with the degree of reasonable certainty required by Missouri courts and the Eighth Circuit's interpretation of Missouri case law in *Handi Caddy*. Plaintiff cites *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), in support of his position that he has proven his anticipated profits with reasonable certainty. The court in *Miller* held that the owner of the PRISCILLA ANN, a new fishing boat that was unable to sail for several weeks because of a faulty engine had proven anticipated lost profits with reasonable certainty by relying on the catches of three similar vessels. The court noted that the "appropriateness of the other vessels' catches for comparison was demonstrated by the PRISCILLA ANN's comparable average daily catches during the period all four vessels were fishing" and the

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[8] Walker testified on cross-examination that his bar would be "brand new" and that would increase the number of customers. Indeed, this statement appears to concede that there would be at least some decline in business after the bar's opening as a go-go dancing establishment.

fact that all four vessels were subject to similar factors, such as inclement weather. *Id.* at 822.

Even if plaintiff had evidence that the bar had operated for some period of time with dancers, and had profits similar to that of other go-go bars during that time, the court believes *Miller* is distinguishable. First, unlike *Miller*, where the boats were fishing in the same location, the bars mentioned by plaintiff's witnesses are not located in the same or similar parts of Kansas City. Perhaps more importantly, however, plaintiff has produced evidence of only one business, Angelina's, that has a profit margin anywhere near the amount plaintiff claims he would have had. Plaintiff in *Miller*, on the other hand, produced evidence of three such businesses. Because plaintiff has not proven his damages with reasonable certainty, the court will not award damages for the loss of his anticipated profits.

The court will, however, award plaintiff $1.00 in nominal damages since "[t]he general theory of nominal damages is that they should be allowed where a legal right has been invaded but no actual damages were suffered or proved." *McClellan v. Highland Sales & Investment Co.*, 484 S.W.2d 239, 241 (Mo. 1972). Plaintiff has established a violation of a legal right and, consequently, the court believes that an award of nominal damages is appropriate in this case.

Having decided the proper remedy for the city's violation of plaintiff's first amendment rights, the only issue remaining for this court's consideration is plaintiff's request for an award of attorney's fees. The parties have briefly discussed this issue in other appearances before

the court but have not presented any evidence on the amount of the fees. The court will grant a hearing on this issue if the parties desire or, alternatively, the court will decide the issue based on pleadings and appropriate affidavits.

Accordingly, it is

ORDERED that defendant is permanently enjoined from enforcing its C-X zoning ordinance against Joe E. Walker d/b/a Last Chance Lounge. It is further

ORDERED that plaintiff is awarded damages in the amount of $1.00. It is further

ORDERED that within ten days of the date of this order the parties shall advise the court whether they wish to address the issue of attorneys' fees through an evidentiary hearing or through the use of pleadings and affidavits. The court will then issue an appropriate order setting a date for a hearing or, alternatively, for the filing of the necessary pleadings.

/s/ Joseph E Stevens Jr
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

October 20, 1988

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

JOE E. WALKER, JR., d/b/a Last Chance Lounge, Plaintiff, vs. CITY OF KANSAS CITY, MISSOURI, Defendant.	)	No. 87-0939-CV-W-8
	)	FILED NOV 22 1988

ORDER

On October 20, 1988 this court issued its order enjoining defendant from enforcing its C-X zoning ordinance as to plaintiff Joe E. Walker, Jr. and awarding Walker $1.00 in nominal damages for anticipated lost profits. On October 28, 1988 plaintiff filed a motion, pursuant to Fed. R. Civ. P. 59, requesting that the court grant a new trial on the issues of damages, the city's violation of plaintiff's due process rights and the dismissal of the individual city council members as defendants based on their absolute immunity from suit while acting in their legislative capacities. Since plaintiff's motion fails to cite any factual or legal authority in support of the motion for a new trial on due process and absolute immunity grounds, the court will deny the motion as to those two issues. This order discusses only plaintiff's argument that the court erred in awarding $1.00 in nominal damages and the related argument that a new trial should be granted based on evidence of plaintiff's profits during the first two weeks of the business' operation as a go-go dancing bar.

In its October 20 order this court held that plaintiff was entitled to only $1.00 in nominal damages because he had failed to prove his anticipated lost profits with the degree of certainty required under Missouri law. Plaintiff argues that the court placed too much emphasis on his lack of managerial experience in go-go dancing establishments and that plaintiff proved his damages by the best evidence available, as required by *Moore v. St. Louis Southwestern Railway Co.*, 301 S.W.2d 395 (Mo. App. 1957).[1] While the court in *Moore* held that a plaintiff is only required to produce "the best evidence available" to prove damages, it specifically noted that this evidence must be "sufficient to afford a reasonable basis for estimating [the] loss." *Id.* at 403. In this case, the court's order specifically noted a number of reasons why it believed the evidence proffered by plaintiff was not sufficient to justify an award of damages of more than $1.00. Thus, the court finds that it properly evaluated plaintiff's prayer for anticipated lost profits.

Plaintiff argues that a new trial should be granted since he has now begun to offer go-go dancing as entertainment at the Last Chance Lounge and, therefore, is in a position to present more definitive testimony on the amount of his damages. In support of this argument, plaintiff submitted an affidavit, dated October 31, 1988, stating that his average receipts in the first two weeks of

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[1] Plaintiff also cites *Herrington v. Hall*, 624 S.W.2d 148, 154 (Mo. App. 1981). *Herrington* adds little to this argument, however, since it merely states that damages must be proved with reasonable certainty. This standard is the one on which the court relied in its October 20 order.

business were $2,235.45, an amount approximately equal to that which he had earlier projected he would earn.[2]

Plaintiff's October 31 affidavit does not change the analysis used by the court in its October 20 order. First, the affidavit presents only gross receipts and does not give any information as to the amount of actual profits plaintiff realized during this two-week period. Although some evidence of costs was adduced at the damages hearing, certain issues, such as the amount which plaintiff would pay to the dancers and the number of dancers, had not yet been determined. Thus, the affidavit alone would not allow the court to determine plaintiff's profits. More importantly, however, plaintiff conceded at the damages hearing that business would be better than expected when the bar first opened as a go-go dancing establishment since patrons would be attracted by the novelty of the entertainment. *See* October 20, 1988 Order at 11 n.8. As a result, the court stands by its earlier ruling

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[2] Plaintiff notes that he began offering go-go dancing on October 17, 1988, three days before this court issued its order detailing the scope of injunctive and monetary relief. He states that he began offering go-go dancing before the court issued its order since at oral argument the court asked plaintiff whether he had begun to offer go-go dancing at the Last Chance Lounge. Plaintiff states that it was his understanding that since the court asked the question he was permitted to begin offering go-go dancing. The court notes that its question was merely an inquiry, and not a definitive ruling that plaintiff could begin to offer go-go dancing. Indeed, the court later stated that it would continue to take the issue of damages and the proper scope of injunctive relief under advisement, a comment which the court believes to be an implicit, if not explicit, statement that it had not yet determined what relief would be appropriate.

that plaintiff has failed to prove his anticipated loss of future profits with the degree of certainty required under Missouri law.

In addition to the motion for a new trial, the parties have submitted a stipulation regarding attorneys' fees and costs to the court. In this stipulation, received on November 4, 1988, the parties agree that defendant shall pay plaintiff $19,976.79 in settlement of all costs and attorney's fees through the entry of judgment on October 20, 1988. Accordingly, it is

ORDERED that plaintiff's motion for a new trial is denied. It is further

ORDERED that the court approves the parties' stipulation and defendant shall pay plaintiff $19,976.79 for costs and attorneys' fees accrued through the entry of judgment on October 20, 1988.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

November 22, 1988

APPENDIX G

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law. . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT V

No person shall . . . . be deprived of life, liberty, or property, without due process of law. . . .

AMENDMENT XIV

Section 1. No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XXI

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

UNITED STATED CODE

CIVIL RIGHTS

42 § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

KANSAS CITY, MISSOURI
CODE OF GENERAL ORDINANCES

Sec. 39.156. District C-X. (Adult Bookstores, Entertainment Facilities, Theaters, Bathhouses, Massage Shops, Modeling Studios and Artist-Body Painting Studios, and Exotic Dance Facilities: Overlay Zone.)

I. *Definitions*:

A. *Adult*: As used in this section, refers to persons who have attained the age of at least eighteen (18) years.

B. *Adult bookstore*: An establishment or business having as a predominant part of its stock-in-trade, objects or books, magazines, photographs, pictures or other periodicals which are distinguished or characterized by

their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein) and limited in sale of such sexual material to adults.

C. *Adult entertainment facility*: Any building, structure or facility which contains, or is used for commercial entertainment where the patron directly or indirectly is charged a fee to either (1) engage in personal contact with or to allow personal contact by employees, devices or equipment or by personnel provided by the establishment which appeals to the prurient interest of the patron or (2) to observe persons with their genitals or pubic region exposed or covered only with a transparent covering or female person with the areola and nipple of the breast exposed or covered only with a transparent covering or to observe "specified sexual activities" (as defined herein).

D. *Adult theater*: Any building, structure or facility with a capacity of two (2) or more persons used for presenting material predominantly distinguished or characterized by an emphasis on matters depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein), for observation by patrons therein.

E. *Area zoned for residential use:* For purposes of this section, areas zoned for residential use are defined as Districts R-1, R-A, R-2, R-3, R-4, R-4-O, R-5, R-5-O, GP-7, GP-6, GP-5 and GP-4.

F. *Artist-body painting studio*: An establishment or business which provides the services of applying paint or other substance whether transparent or nontransparent to or on the

human body when such body is wholly or partially nude.

G. *Bathhouse*: An establishment or business which provides the services of baths of all kinds, including all forms and methods of hydrotherapy, unless operated by a medical practitioner or professional physical therapist licensed by the state.

H. *Church*: A facility for religious use.

I. *Exotic dance facility:* Any building, structure or facility which contains, or is used for commercial entertainment, where the patron directly or indirectly is charged a fee to observe "specified anatomical areas," provided that the genitals and pubic area of all persons and the areola and nipple of the breasts of all female persons are opaquely covered.

J. *Massage shop:* An establishment or business which provides the services of massage and body manipulation, including exercises, heat and light treatments of the body, and all forms and methods of physiotherapy, unless operated by a medical practitioner or professional physical therapist licensed by the state.

K. *Modeling studio:* An establishment or business which provides the services of modeling for the purpose of reproducing the human body wholly or partially in the nude by means of photography, painting, sketching, drawing or otherwise.

L. *Overlay zone*: An overlay zone as herein described is a zone, having boundaries conterminous with or circumscribed by an existing district, which imposes additional limitations or authorizes additional uses

otherwise not required or permitted in the district.

M. *Owning property*: For the purpose of this section, "owning property" is defined as a present freehold interest in real property.

N. *School*: For the purpose of this section, a school is defined as a public elementary, secondary or high school; and private schools with curricula equivalent to that of public elementary, secondary or high schools.

O. *Specified sexual activities*: For the purpose of this section, "specified sexual activities" is defined as:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

P. *Specified anatomical area*: For the purpose of this section, "specified anatomical areas" is defined as:

1. Less than completely or opaquely covered:

   (a) Human genitals, pubic region;

   (b) Buttocks;

   (c) Female breast area below a point immediately above the top of the areola.

2. Human male genitals in a discernibly turgid state even if completely and opaquely covered.

II. *Uses Regulated:* Adult bookstores, adult entertainment facilities, adult theaters, bathhouses, massage shops, modeling studios and artist-body painting studios, and exotic dance facilities, as herein defined, shall be located only in District C-X, as established by this section. Such districts may only be established by the council as "Overlay zones" in Districts C-2, Local Retail Business District; C-3, Intermediate Business; and C-4, Central Business district. Any such use permitted by this section shall be adequately screened from public view.

III. *1000 Feet Distance Limitations; Waiver:*

A. No adult bookstore, adult entertainment facility, adult theater, bathhouse, massage shop, modeling studio or artist-body painting studio, or exotic dance facility, shall be established within one thousand (1,000) feet of any church, school or area zoned for residential use.

B. Not more than two (2) of the uses regulated by this section may be located within one thousand (1,000) feet of each other.

C. the limitations set forth in paragraphs III.A and III.B of this section may be waived if the person applying for the waiver shall file with the city plan commission a petition which indicates approval of the proposed regulated use by fifty-one (51) percent of the persons residing or owning property within a radius of one thousand (1,000) feet of the location of the proposed use. The city plan commission shall adopt rules and regulations governing the procedure for the securing of the petition and consent provided for in this section. The rules shall provide that the circulator of the petition

requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the city plan commission and that the circulator personally witnessed the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon. The city plan commission shall not consider the waiver of locational requirements set forth hereinabove until the above-described petition shall have been filed and verified.

IV. *Public Decency and Morals Ordinance Not Repealed*: No provision of this section shall be construed to repeal or amend section 26.141 through and including section 26.145, Code of General Ordinances, or any part thereof. No provision of this section shall be construed to permit any activity otherwise prohibited by federal state or local law.

V. *Severability*. If any provision of this section is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, the remaining provision of this section shall not be invalidated. (Formerly 65.156, amended by 3rd C.S. Ord. No. 46880, 12-19-76; Ord. No. 49774, 2-23-79; Enact 39.156, C.S. Ord. No. 58610, 11-1-84)

MISSOURI STATUTES

§ 573.010(13) R.S.Mo. (Supp.)

(13) "**Sexual conduct**", actual or simulated, normal or perverted acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic areas, buttocks, or the breast of a female in an act of apparent

sexual stimulation or gratification or any sadomasochistic abuse or acts including animals or any latent objects in an act of apparent sexual stimulation or gratification;

APPENDIX H

RELEVANT PORTIONS OF PURPOSE STATEMENT OF KANSAS CITY, MISSOURI, C-X ZONING ORDINANCE.

WHEREAS, the City Council is promoting development of Kansas City, Missouri, with special attention to the central City; and

WHEREAS, the City Council recognizes the economic importance and the importance of the image of the central City; and

WHEREAS, there has come to the attention of the City Council the proliferation in this and other cities of establishments selling sex-related paraphernalia; and

WHEREAS, there has come to the attention of the City Council the proliferation in other cities of establishments featuring nude dancing and other displays of nudity; and

WHEREAS, the City Council recognizes that to the extent such establishments are located outside a District C-X, such establishments violate the Zoning Ordinances of this City; and

WHEREAS, the City Council, to promote the health, safety, morals and general welfare of the community, desires to address directly the negative impact such establishments have upon the economic development and image of the central City;

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(2)

No. 90-1075

In The

Supreme Court of the United States

October Term, 1990

JOE E. WALKER, JR., D/B/A
THE LAST CHANCE LOUNGE,

Petitioner,

vs.

CITY OF KANSAS CITY, MISSOURI; RICHARD L. BERKLEY, MAYOR OF KANSAS CITY, MISSOURI; THE CITY COUNCIL OF KANSAS CITY, MISSOURI; CHUCK WEBER; SALLY JOHNSON; FRANK PALERMO; ROBERT M. HERNANDEZ; JOANNE M. COLLINS; CHARLES A. HAZLEY; DAN COFRAN; KATHERYN SHIELDS; EMANUEL CLEAVER; MARK BRYANT; AND JOHN A. SHARP,

Respondents.

Petition For Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals' reversal of the district court's judgment warrants review by this Court.

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No. 90-1075

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Respondents.

Petition For Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

October 30, 1987 Petitioner filed his complaint for the Declaratory Relief, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction in the United States District Court for the Western District of Missouri, Western Division. Petitioners pertinent sworn factual allegations were: "12. The Last Chance Lounge is a tavern

located at 13200 East 350 Highway, in southeast Kansas City, Missouri. 15. Plaintiff wishes to introduce in his establishment a form of entertainment commonly known as "go-go dancing" and 16. In order to achieve his purpose, Kansas City Zoning Ordinance Section 39.156(II) GOKC requires the Plaintiff's property to be classified as a C-X Zoning District before Plaintiff may offer such entertainment . . . " Petitioner was seeking the approval of a CX overlay zone as a prerequisite to the amendment of his liquor license to permit a form of entertainment not previously permitted under said liquor license. Petitioner successfully complied with all preliminary requirements pertaining to consideration of said Zoning Ordinance except that Petitioner offered no evidence for the consideration of the City Plan Commission, the Plans and Zoning Committee of the City Council, in his deposition or in his testimony in the trial court as to the specific type of entertainment he proposed in his tavern. Petitioner presented his matter to the District Court as a "license case" not a zoning case. The District Court determined that the requirements imposed upon the Petitioner to obtain CX Zoning prior to the amendment of his liquor license was essentially a requirement of obtaining a license for the purpose of engaging in this form of expression, hence a prior restraint. *Walker vs. Kansas City*, 691 F.Supp. 1243, 1250 (WD Mo. 1988) (Walker I).

Under Missouri law, licenses are personal and do not run with the real property. While the trial court decided the initial claim on the basis of a license, it erroneously treated the aspects of its order as a zoning matter in holding that "the court disagrees, however, with the City Attorney's interpretation that the injunction may only

last as long as Mr. Walker maintains his leasehold property interest.", *Walker vs. Kansas City*, 697 F.Supp. 1088, 1090 (WD Mo. 1988) (Walker II).

The Eighth Circuit Court of Appeals decision reversed the judgement for the petitioner and upheld the validity of the ordinance, *Walker vs. Kansas City*, 911 F.2d 80 (8th Cir. 1990 Reh. den. 1990) (Walker III).

REASONS FOR DENYING THE WRIT

This Court should deny the petition in this case for two reasons. First there is nothing in the facts of this case or the proceedings below that establishes a legitimate right of entitlement to the rezoning or the legal relief sought by Petitioner utilizing 42 U.S.C. 1983.

Second, the Eighth Circuit correctly applied the law in reversing the District Courts holdings. The Court correctly applied this Court's standards as enunciated in the *Singleton vs. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976).

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS TO REVERSE THE DISTRICT COURT BASED UPON AN ISSUE NEVER BRIEFED BY THE PARTIES OR CONSIDERED BY THE COURT BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE EIGHTH CIRCUIT OR THIS COURT.

Respondent City and respondents elected officials did nothing to deprive Petitioner of any property right. At trial, Petitioner testified: "question – So you are not

claiming today . . . that you had a right to this zoning? Answer – I never claimed a right to anything" (TR68). From these comments it's quite clear that Petitioner had nothing more than a unilateral desire to change his existing tavern business. Petitioner must have more than a unilateral expectation. *Board of Regents of State Colleges vs. Roth*, 408 U.S. 564, 576-77 (1972).

The Court correctly applied this Court's standards as enunciated in the *Singleton vs. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) as followed by the Eighth Circuit in *Frank vs. Brookhart*, 877 F.2d 671, 676 (8th Cir. 1988 Reh. den. 1989).

II. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT CONSTRUE A LAND USE ORDINANCE AS A LIQUOR CONTROL ORDINANCE AND HENCE THE DECISION DOES NOT CONFLICT WITH APPROACHES TAKEN BY OTHER CIRCUIT COURTS OF APPEALS IN CASES INVOLVING THE SERVING OF LIQUOR IN ADULT ENTERTAINMENT ESTABLISHMENTS.

The Eighth Circuit Court of Appeals decision takes cognizance of the entire record made by Petitioner before the City hearings and the trial court. The Eighth Circuit reliance upon the authority of the twenty first amendment, *California vs. LaRue*, 409 U.S. 109 (1972) and *New York Liquor Authority vs. Bellanca*, 452 U.S. 714 (1981) is firmly grounded upon facts contained in the record before the City Plan Commission, the Plans and Zoning Committee of the City Council, and in the trial court. Petitioner did not attack the ordinance in question, 39.156 GOKC, on its face, but only its application to his licensed liquor business.

III. THE PRONOUNCEMENTS OF THE EIGHTH CIRCUIT COURT OF APPEALS REGARDING THE PROTECTION OFFERED TO SEMI-NUDE DANCING UNDER THE FIRST AMENDMENT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUIT COURTS OF APPEAL.

Petitioner's third point is frivolous, and specious. The Eighth Circuit Court of Appeals held: "although we do not decide the question as to whether the founding fathers had 'exotic dancing' in mind when they pinned the first amendment, our decision need not rest on a holding that go-go dancing is not protected speech . . . ". Petitioner has misconstrued the Court's holding. For this reason and the other reasons heretofore discussed, Petitioner's Petition should be denied. *Walker III id.* at 90.

IV. THE EIGHTH CIRCUIT COURT OF APPEALS DID NOT FIND SEMI-NUDE DANCING TO BE OBSCENE.

The Eighth Circuit Court of Appeals was not citing *Miller vs. California*, 413 U.S. 15 (1973) for the proposition that the activity to be conducted in Petitioner's liquor establishment was obscene, but rather in an effort to attempt to understand the machinations of the Seventh Circuit Court of Appeal in their case of *Miller vs. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), recently argued and pending decisions by this Court at this time. Perhaps that decision will be dispositive of this matter.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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